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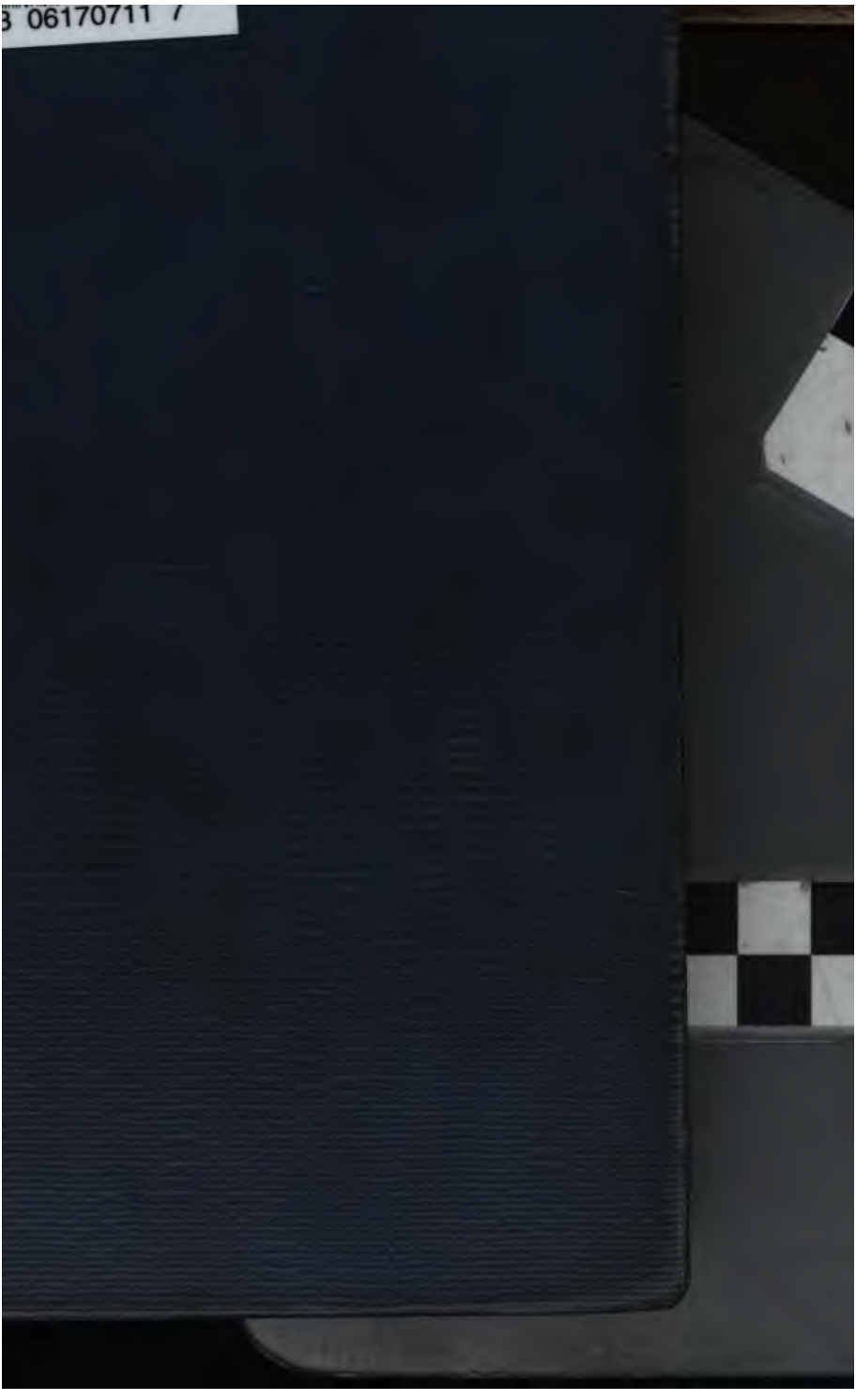

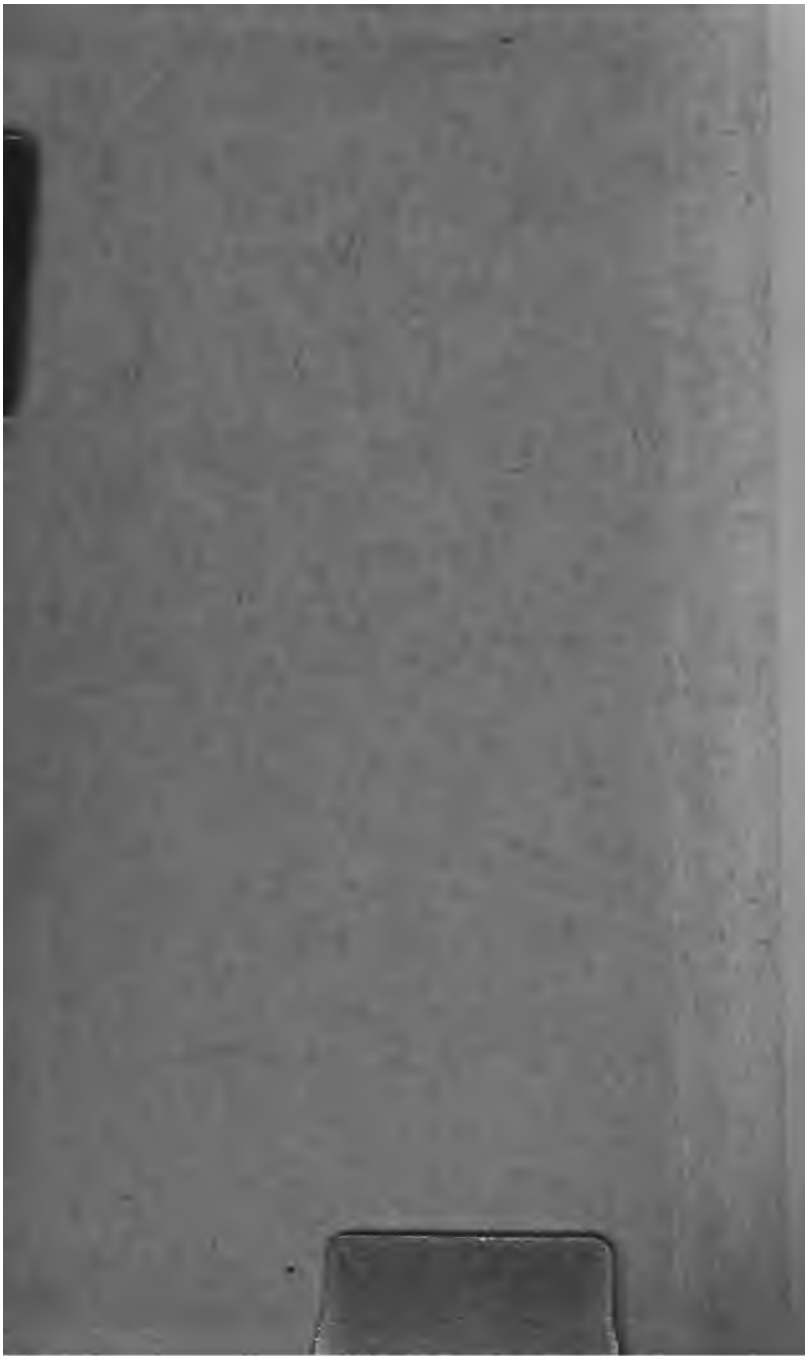

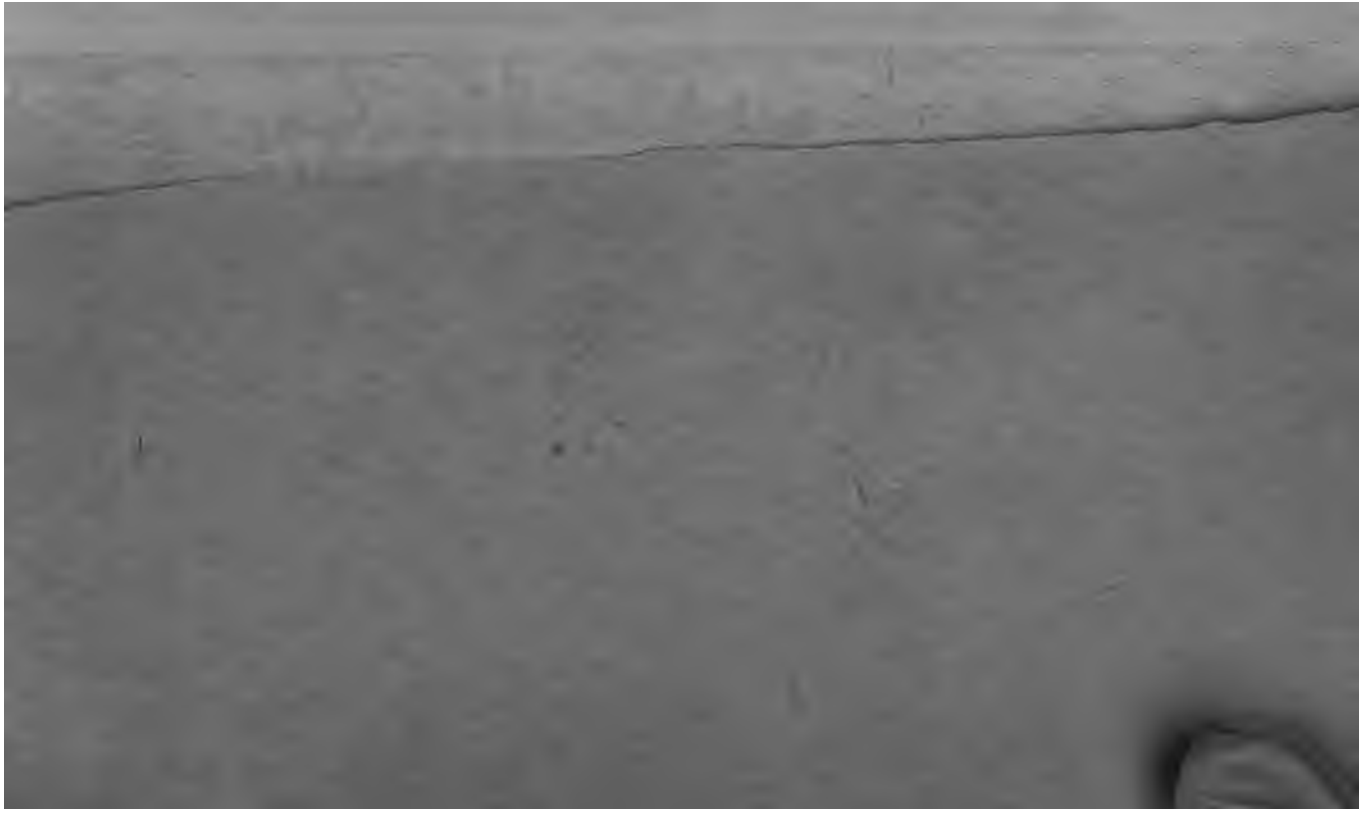

# UNPOPULAR GOVERNMENT IN THE UNITED STATES

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# Unpopular Government in the United States

*By*

ALBERT M. KALES

*Professor of Law in Northwestern University*

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# INTRODUCTION

The plan for state and municipal governments generally accepted in the United States in the middle period of the nineteenth century gave great satisfaction in the provincial and frontier communities where it was adopted and which then composed the principal part of the United States. In many nooks and corners of the country today we have relics of this provincial and frontier society. In such districts this plan for state and municipal governments is entirely satisfactory in practice. To depart from it would be unwise, for the reason that in matters of government that which is and which is not positively objectionable should be let alone. Frequently men of talent and power, whose youth was spent in the provincial and frontier era of our social and political development, still find conditions about them not so much changed. To them the mid-nineteenth-century plan and its practice are entirely satisfactory. Any criticism of it would

at once meet with a vigorous and, no doubt, from the point of view of provincial and frontier conditions, a complete defense. To the inhabitants of those parts of the United States where such provincial and frontier conditions still exist the following essay is not addressed.

So long as the more simple and primitive conditions of society which obtained in the first half of the nineteenth century were all but universal in the United States, any criticism of the plan of state and municipal government which prevailed was a purely academic exercise. Even when, in some districts, conditions had changed and great cities had arisen with enormous wealth and population, to which the mid-nineteenth-century plan of government did not seem to fit in practice, the majority were still so far satisfied as to make any criticism of that plan of merely speculative value. But in the second decade of the twentieth century the provincial and frontier type of society will be found to embrace a distinct minority of the population of the country. The social conditions presented by a large population in a small

area, with a highly organized and differentiated social structure, have become common to a large portion of the population of the entire country. Whether the application of a mid-nineteenth-century plan of government to these conditions is satisfactory is, therefore, no longer an academic or speculative question. Its due consideration has perhaps rather become to the last degree vital to the life of the nation. To those who are face to face with this problem the following essay is addressed.

# PART I

## THE RISE OF THE POLITOCRATS

## CHAPTER I

### UNPOPULAR GOVERNMENT—DEFINED—HOW FORMERLY MAINTAINED—PRECAUTIONS TAKEN TO AVOID IT

Unpopular government is, and indeed always has been, a government of the few, by the few, and for the few, at the expense and against the wish of the many.

In a former era unpopular government was achieved and maintained with simple directness. All governmental power was, by a monarchical or oligarchical plan, openly placed in the hands of the few. Human characteristics insured the selfish use of that power. The maintenance of such selfish use of governmental power against the wish of the majority was accomplished by denying any legal opportunity to the majority to express itself, and by the perpetuation of power in the hands of the few by inheritance or appointment.

The makers of our mid-nineteenth-century state and municipal governments undertook to

free this land from unpopular government. If all governments must be tyrannical from the point of view of some, they preferred the tyranny of the majority to the tyranny of the minority. Their aim was to establish and maintain a government "of the people, by the people, and for the people," as distinguished from a government of the few, by the few, and for the few, at the expense of the many and against their wish. They could not, however, change human characteristics. The tendency, therefore, to use power selfishly continued. They did endeavor to prevent the concentration of power in the hands of the few by splitting the power of government up among many separate and distinct offices and limiting the power which any one officeholder might exercise. They sought to make impossible the retention of power in the face of popular disapproval by requiring all offices of importance in the government to be filled by popular election and the elections to be held frequently. For the greater part of a century these ways and means of heading off unpopular government have been

constantly employed in the development of our state and municipal governments. The belief of the people in popular government has become a belief in these two means of obtaining it. In popular estimation the means have become the end. Inevitably these expedients for securing immunity from unpopular government have been pressed to great extremes.

The application of the principle that governmental power must be kept out of the hands of the few is responsible for that fundamental characteristic of American constitutions known as the separation of powers among the three departments of government. The entire power of the government is exercised by the executive, the legislative, and the judicial departments. None is allowed to perform any of the functions which belong to either of the others. If it does so, its action is unconstitutional and void. Each department is, therefore, supreme and independent in its own field. This is the beginning of decentralization. In the distribution of powers, each department is designed to be a check upon the others. The legislature,

being the most powerful by reason of its control over the making of the laws and appropriations, is naturally a substantial check upon the executive and judicial departments. Our constitution-makers have, therefore, been particular to devise checks upon the legislature by the other two departments. The executive is given a wide veto power upon all legislation, although the veto may be overridden by a two-thirds vote of the legislature. The courts in their power to declare laws unconstitutional are given, potentially at least, an effective veto power upon legislation. The scope of it is narrower than the executive veto, but on the other hand the veto of the courts cannot be overridden by any action of the legislature. The actual operation of these checks and balances, coupled with the complete separation of powers, has resulted in irritation and bickering between the departments. The trouble between the executive and the legislative departments especially is frequent and acute. The executive is the most conspicuous single official. He is elected upon a platform of

pledges for legislation. He seeks to redeem those pledges by promoting the introduction of bills and pushing them through the legislature. The legislature feels hostile toward the executive for attempting to coerce its action. The executive loses patience with the legislature for not redeeming the pledges of the executive to the electorate. The legislature is frequently hostile toward the Supreme Court for declaring laws unconstitutional. The executive also comes in conflict with the judiciary by reason of the fact that the latter upsets legislation which the executive has sometimes been able to secure only by trading for votes important appointments which cannot be recalled. The executive and legislative departments are likely to feel that the Supreme Court has gone beyond its judicial power in declaring laws unconstitutional. The result is that each of the departments of government fails to work in harmony with the others. Each tends to retire to its own constitutional sphere and there spend considerable time in doing what it pleases, regardless of the other departments,

and from time to time blocking and hampering them. In this way the least progress is made with the important business of legislation and the functioning of the executive and the judicial departments.

Our constitution-makers, however, went even farther in preventing the concentration of the powers of government. They split up and dissipated the powers of each department among as many different offices as possible. They split up the legislative power between two chambers, each operating as a check upon the other. In Illinois they went a step farther and split up the power of the lower house by providing a method whereby every third member might be the representative of a minority party. A general check upon the power of the legislature is frequently found in the provision that it can meet for general legislative business only every two years, or that it can remain in session for such general legislative purposes only a specified number of days. The result is that the legislative power is not only hampered from without by executive and

judicial vetoes and the limited time in which to act, but it is divided within among bodies which are more or less antagonistic to each other. The executive power of the state, if lodged wholly in the governor, acting through his appointees, might still have been a very extensive power, but it would have been too much power in one man to meet the approval of our constitution-makers. Hence the executive power has been split up among several independently elected executive officers, viz., the governor, the attorney-general, the secretary of state, the state treasurer, the state auditor, the state superintendent of public instruction, and the trustees of the state university. Each one of these officers is independent in the discharge of his statutory or constitutional duties. So far as they divide executive power among them, they take power from the chief executive. In the judicial department we find the same pains to give out the minimum amount of power to any single judge or group of judges. We find usually several courts of original jurisdiction, each with power to handle limited and

defined classes of cases. There are justices of the peace, municipal courts, probate courts, juvenile courts, criminal courts, and circuit courts, the last having the most general jurisdiction. Then follow a succession of appellate tribunals, each with a limited jurisdiction to hear appeals. The trial judges have had their power restricted by being forbidden to exercise any control over juries by oral instructions upon the law. They have no power to give any instructions upon the evidence. They have been reduced in jury trials to the position of umpires for forensic duels between lawyers. In the appellate tribunals they are usually forbidden to review questions of fact. Their function is confined very narrowly to the affirming of the decision below, or reversing it without remanding it, or reversing and remanding it for a new hearing. They are denied any power of hearing further evidence or making a proper order so as to settle the litigation if possible in the appellate tribunal. The work of appellate courts consists to so large an extent of opinion writing and closet work that the office is incon-

spicuous and not very attractive. In most states the judges are elected. Each one is independent in the exercise of the duties of his statutory jurisdiction. Even the clerks of the various separate courts are in many instances elected. They are absolutely independent of the judiciary or of any other officer of the legal government in the exercise of their statutory duties. There is no administrative head of the court with large powers over the direction of the work of other judges and the clerical force and a corresponding responsibility for the conduct of judicial business. In the everyday work of his office the judge, under the present plan of government, is amenable to no authority except his own conscience and a fear of unfavorable public comment upon his actions.

In our municipal governments the legislative power is usually exercised by a single chamber, though there are instances of double chambers in the city council. In the less important municipal governments, such as counties, villages, and special commissions, we frequently find a part of the executive power

vested in the municipal legislative body or in some member of it. Thus, in county governments we frequently find the chief executive the presiding and most influential member of the board of commissioners. In the cities, however, there is usually a complete separation of the legislative and executive functions, the legislative power being committed to a council and the executive functions to a mayor and other subordinate officers. There is a general tendency toward the splitting-up of the executive power among different executive officers who are elected and are independent of any superior authority in the performance of their statutory duties. A city government will usually distribute the executive power among a mayor, a treasurer, a comptroller, and a clerk. The executive power of a county government will be split up among a president of the county board, a county clerk, a sheriff, a county treasurer, a county superintendent of schools, members of the board of assessors, and the board of review. A great deal of unobserved splitting-up of executive and legislative

functions in municipal governments has been accomplished by the creating of several municipal corporations with special functions operating in the same territory. For instance, where a city and county government cover the same territory we have two municipal legislatures operating in the same territory, and also two sets of executive officers. Thus is the legislative and executive power necessary for a given district split in half. If a drainage district, a park district, a school district, a public library district, each controlled by commissioners or trustees with executive and legislative power, be added, all operating in the same territory with a city government and a county government, we have still further split up the municipal executive and legislative power. Such situations are common enough.

The principle of decentralization has even been applied so as to prevent the assistance to the government which might be derived from experts in various lines. The place where the largest number and variety of experts in the most departments of learning can be found is

the largest city of the state. If that city happens to be one of the great cities of the country and of the world, it will also be an important center of intellectual activity of all sorts. It will very likely have in or near it one or more great universities. Yet in such states we are likely to find that an ancient fear of mob influence over legislation has placed the state capital at some distant geographical center which is not even a transportation center. Not infrequently the state university will be found at some point more or less inaccessible to both the largest city of the state and the capital. These are arrangements which tend directly to the separation of the government from the aid of expert knowledge and the best intelligence of the state.[1]

Members of the state and municipal legislatures are, of course, elective. Moreover, the judges and state, county, and city administrative officers are also elective. In addition to preventing any officer from holding his place

[1] Compare Godkin, *Essays on Problems of Modern Democracy*, pp. 305–6.

and his power against the will of the majority, the wide application of the elective principle aids in the decentralization of the executive power. It tends to make every elective officer independent of every other officer in the discharge of his statutory duties. By subjecting to an election at a given time a part only of the total number of officers elected, a further check upon the concentration of power is secured. The officers who do not come up for election at a particular time may be of a different political faith from those who are elected. In the same administration, therefore, some officeholders may stand as a check upon the actions of the others. In obedience to the principle of frequent elections all officers hold for brief terms of one, two, four, or six years—usually for two or four years.

Those who devised this plan of government for use in the United States no doubt thought that the citadel of popular government as thus guarded was absolutely impregnable. How could the power of government fall into the hands of the few when it had been so carefully

split up among so many who could not possibly work together in harmony? How could the power of government be retained in the face of popular disapproval when those who exercised it were subject to such frequent elections? Nevertheless, the impossible has again happened. The impregnable citadel has been taken. The manner of its assault and capture is even now one of the unexpected and, to many who appreciate only in a general way what has occurred, one of the incomprehensible events of history.

# CHAPTER II

## UNPOPULAR GOVERNMENT—HOW ESTABLISHED IN THE UNITED STATES IN SPITE OF THE PRECAUTIONS TO PREVENT IT

### Section 1

### Introductory

In brief outline this is what has occurred: As the population of the country has grown and communities and states have passed more and more beyond the frontier stage of development, the decentralization of governmental power has constantly increased and the elective principle has been more and more extensively applied. As a consequence the burden placed upon the electorate has become more and more onerous. The voter has been called upon to vote more often and for an increasing number of officers. He must theoretically examine into the qualifications of a large number of candidates at frequent intervals. This has placed upon intelligent voting an enormous educational qualification. The task of the voter to obtain sufficient

information about candidates long ago passed beyond what even the very intelligent citizen could fulfil and still maintain his place in competitive industry. The result is that the voter, though extremely intelligent in general, comes to the polls in utter ignorance of candidates and their qualifications for office. Nevertheless, he insists, in spite of his political ignorance, upon voting for someone. He takes his voting seriously and endeavors to make a show of voting intelligently. This attitude necessarily requires him to secure advice from someone as to whom to vote for. At once there is created the opportunity for the adviser to the voter. He first appears naturally as a local leader whom the electorate trusts. Soon, however, there arises the man who makes advising the politically ignorant voter his profession. Then this professional adviser becomes more of a director to the politically ignorant voter. This process goes on in every electoral district where the voter is politically ignorant enough to need some advice. It is not long before there is developed a hierarchy of professional advisers

and directors to the politically ignorant voter. Sometimes there are competing hierarchies of such advisers and directors. One or the other, however, is the more generally successful, or both by agreement divide the privilege of advising the politically ignorant voter how to vote—each helping the other in its exclusive territory. Those who direct the politically ignorant majority how to vote have filled the state and municipal offices with those who are loyal to them first and to the governed afterward. The leaders of the successful organization of advisers and directors to the politically ignorant electorate have become an extra-legal but none the less real government. A decentralized legal government has been replaced by a centralized extra-legal government. Thus the power of government has again drifted into the hands of the few. These, pursuant to well-known human characteristics, use that power selfishly. The decentralized character of the legal governmental power, the fact that only part of the offices are filled at any time, and the enormous advantage which comes from

having a standing army of advisers and directors to guide the mass of politically ignorant voters, make it difficult to replace at the polls with real representatives of the electorate the appointees of this extra-legal government. We have, therefore, come finally to a well-defined extra-legal but none the less real government of the few, by the few, and for the few, at the expense and against the wish of the many. We have, in a word, achieved the establishment of a substantial unpopular government.

In form the politically ignorant voter is aided by the altruistic advice of those who know who should be elected. In form the voter can take the advice or not as he pleases. In reality, however, and in actual practice, the power of the electorate to fill the state and municipal offices has been confided by the politically ignorant majority to the leaders in the successful hierarchy of professional advisers and directors to the politically ignorant voter. The elector, by being required to vote too much, has been compelled to surrender to a large extent his

right to vote at all, and to permit others to cast his ballot as they see fit. Formerly people were disfranchised when they were given no opportunity to vote. Today they are disfranchised by being required to vote too much. Formerly the legal rulers of the disfranchised masses were selected for them by the few without equivocation. Today our legal rulers are selected for us by the few through the subterfuge of the masses casting their ballots according to the directions of the few. In other forms of unpopular government the central figure has been the monarch, the autocrat, the oligarch, or the aristocrat. In ours it is the politocrat. We have avoided monarchy, autocracy, oligarchy, and aristocracy, only to find ourselves tightly in the grasp of a politocracy.

So startling a conclusion with respect to our governmental condition invites a detailed consideration of each step upon which that conclusion is founded.

### Section 2

The Burden upon the Electorate—The Inverted Pyramid of Governmental and Electoral Districts—The Offices to Be Filled and the Number of Electors in Each District

No doubt the average American voter in most districts will readily concede the great burden of his political duties. But unless he has analyzed his particular situation he will hardly realize how great is that burden. Of course, the condition of voters in different places will differ in detail, but the important features are much the same everywhere. For the sake of example I will analyze my own situation as a voter of the Village of Winnetka, Township of New Trier, County of Cook, and State of Illinois.[1]

I am one of about 600 voters in a village which elects each spring, on one day, about one-half of the following officers: a president, 6 trustees, a clerk, a treasurer, a marshal and collector, 2 police magistrates, and 6 library trustees; and on another day, shortly afterward, a common-school trustee.

[1] See frontispiece.

I am one of about 2,000 voters in a township which elects, on the same day that the principal village officers are elected, but at a different polling place, about one-half of the following officers: a supervisor, a clerk, an assessor, a collector, a commissioner of highways, 5 justices of the peace, 5 constables, and a poundmaster; and at a later day (but on the same day that the trustee for common schools is elected), 2 high-school trustees.

I am one of about 18,000 voters to elect one member of the state Senate every four years and 3 members of the House of Representatives of the state legislature every two years at the regular November election.

I am one of about 28,000 voters who elect 5 county commissioners at the regular November election every other year.

I am one of about 42,000 voters who elect one member of Congress at the regular November election and one member of the State Board of Equalization every two years.

I am one of about 322,000 voters who elect 3 sanitary trustees every two years at the

regular November election and a president of the Sanitary District every five years.

I am one of about 350,000 voters who elect the following county officers every other year at the November election: 2 of the 5 members of the Board of Assessors, 1 of the 3 members of the Board of Review, 6 of the 18 judges of the Superior Court of Cook County; also about one-half of the following officers: president of the Board of County Commissioners, judge of the Probate Court, judge of the County Court, state's attorney, recorder of deeds, clerk of the Circuit Court, clerk of the Superior Court, clerk of the Criminal Court, clerk of the Appellate Court, clerk of the Probate Court, coroner, sheriff, county clerk, county superintendent of schools, and county surveyor. I am one of about 350,000 voters to elect, every other June at a special election, about 5 of the 15 judges of the Circuit Court of Cook County.

I am one of about 380,000 voters to elect 1 of the 7 justices of the Supreme Court of the state every nine years.

# SPECIMEN BALLOT. 10th Congressional, 7th Senatorial District.

ELECTION OF November 5, 1912

| DEMOCRATIC | REPUBLICAN | PROHIBITION | SOCIALIST | SOCIALIST LABOR | PROGRESSIVE PARTY (FOR SOCIAL JUSTICE) | INDEPENDENT BY PETITION |
|---|---|---|---|---|---|---|
| For President of the United States | For President of the United States | For President of the United States | For President of the United States | For President of the United States | For President of the United States | |
| WOODROW WILSON | WILLIAM HOWARD TAFT | EUGENE W. CHAFIN | EUGENE V. DEBS | ARTHUR E. REIMER | THEODORE ROOSEVELT | |
| For State's Attorney | For State's Attorney | For State's Attorney | For State's Attorney | For State's Attorney | For State's Attorney | |
| ☐ MACLAY HOYNE | ☐ LEWIS RINAKER | ☐ JOHN H. HILL | ☐ WM. A. CUNNEA | ☐ | ☐ GEORGE I. HAIGHT | |
| For Recorder of Deeds | For Recorder of Deeds | For Recorder of Deeds | For Recorder of Deeds | For Recorder of Deeds | For Recorder of Deeds | |
| ☐ JOSEPH F. CONNERY | ☐ JOHN C. CANNON | ☐ W. R. VAN SANT | ☐ BERNARD McMAHON | ☐ | ☐ WALTER WILLIS | |
| For Clerk of Circuit Court | For Clerk of Circuit Court | For Clerk of Circuit Court | For Clerk of Circuit Court | For Clerk of Circuit Court | For Clerk of Circuit Court | |
| ☐ JOHN W. RAINEY | ☐ JOSEPH E. BIDWILL, JR. | ☐ A. E. COLEMAN | ☐ JOS. F. UHLENBROCK | ☐ | ☐ WILLIAM W. CARNES | |
| For Clerk of Superior Court | For Clerk of Superior Court | For Clerk of Superior Court | For Clerk of Superior Court | For Clerk of Superior Court | For Clerk of Superior Court | |
| ☐ RICHARD J. McGRATH | ☐ CHARLES W. VAIL | ☐ J. G. OLSON | ☐ LOUIS J. ENGDAHL | ☐ | ☐ LAWRENCE NELSON | |
| For Coroner | For Coroner | For Coroner | For Coroner | For Coroner | For Coroner | |
| ☐ DENNIS J. EGAN | ☐ PETER M. HOFFMAN | ☐ JOHN R. BOYNTON | ☐ J. W. ZEH | ☐ | ☐ E. F. NAPIERALSKI | |
| For Members of the Board of Assessors (Two to be elected) | For Members of the Board of Assessors (Two to be elected) | For Members of the Board of Assessors (Two to be elected) | For Members of the Board of Assessors (Two to be elected) | For Members of the Board of Assessors (Two to be elected) | For Members of the Board of Assessors (Two to be elected) | |
| ☐ MICHAEL K. SHERIDAN | ☐ WALTER E. SCHMIDT | ☐ F. B. BROOKE | ☐ WM. CHERNEY | ☐ | ☐ WILLIAM A. BURMEISTER | |
| ☐ DAVID M. PFAELZER | ☐ CHARLES KRUTCKOFF | ☐ ROBERTSON COOK | ☐ FRED H. KRAHL | ☐ | ☐ CHARLES A. RAGGIO | |
| For Member of the Board of Review | For Member of the Board of Review | For Member of the Board of Review | For Member of the Board of Review | For Member of the Board of Review | For Member of the Board of Review | |
| ☐ FREDERICK W. BLOCKI | ☐ MATTHEW MILLS | ☐ ARTHUR J. RICH | ☐ BENJ. N. OLIN | ☐ | ☐ | |
| For County Surveyor | For County Surveyor | For County Surveyor | For County Surveyor | For County Surveyor | For County Surveyor | |
| ☐ GEORGE C. WATERMAN | ☐ WALTER A. OLSEN | ☐ O. F. SORBER | ☐ BENJ. EFTING | ☐ | ☐ HARRY I. ORWIG | |
| For President Board of County Commissioners | For President Board of County Commissioners | For President Board of County Commissioners | For President Board of County Commissioners | For President Board of County Commissioners | For President Board of County Commissioners | |
| ☐ PETER BARTKEN | ☐ ALEXANDER A. McCORMICK | ☐ JOHN H. STEHMAN | ☐ GEO. KOOP | ☐ | ☐ | |
| For County Commissioners (Three to be elected) | For County Commissioners (Three to be elected) | For County Commissioners (Three to be elected) | For County Commissioners (Three to be elected) | For County Commissioners (Three to be elected) | For County Commissioners (Three to be elected) | |
| ☐ HARRY HOWARD PEABODY | ☐ WILLIAM BUSSE | ☐ H. J. LAGERSHUTT | ☐ P. L. ANDERSON | ☐ | ☐ AVERY COONLEY | |
| ☐ J. T. MURPHY | ☐ JAMES A. NOBLE | ☐ FRANK EISENBERGER | ☐ GEORGE CHANT | ☐ | ☐ HARLEY B. MITCHELL | |
| ☐ HENRY QUADE | ☐ ALFRED VAN STEENBERG | ☐ C. O. BORING | ☐ CLARENCE MOWRY | ☐ | ☐ ELLSWORTH M. BOARD | |
| ☐ HORACE M. McCULLEN, | ☐ JOSEPH CAROLAN | ☐ GEO. HOOVER | ☐ JACOB BRUNING | ☐ | ☐ A. M. ANDERSON | |
| ☐ A. BAUMGARTNER | ☐ WILLIAM C. HARTRAY | ☐ A. KELSEY | ☐ THORNTON D. GWIN | ☐ | ☐ JOHN J. GARD | |

I am one of about 1,100,000 to elect at the regular November election every two years about one-half of the following state officers: a governor, a lieutenant-governor, a secretary of state, an auditor, a treasurer, a state superintendent of public instruction, 6 trustees of the state university, clerk of the state Supreme Court, and 2 congressmen at large.

I am one of about 15,000,000 voters who elect a president and vice-president of the United States every four years at the regular November election.

When I entered the voting booth at the regular November election in 1912, the ballot given me to mark was 22×28 inches in size. It called upon the voter to do his part in filling, exclusive of presidential electors, 34 offices. It presented for his consideration, exclusive of presidential electors, 181 names from which to make selections:[1]

[1] The ballot which the voter in Chicago faced at the same election was even larger. It was 19×31 inches and presented elections to 53 offices, exclusive of the presidential electors, and 267 names, exclusive of the presidential electors, to be voted upon. At the fall election in Cook County in 1910 the ballot was 17×20 inches. It presented 52 offices to be filled and 190 candidates for the voter to investigate.

An enumeration of the offices to be filled by election merely emphasizes the number of candidates whom the voter should inform himself about. The extent of the burden upon the voter is not fully appreciated until it is perceived how difficult actual conditions make it for him to obtain information regarding candidates for office. The least important and most inconspicuous state and local offices, as well as the most important and conspicuous, must engage the attention of the electorate of the entire governmental district. But the candidates for inconspicuous and unimportant offices must usually be men who are inconspicuous or unimportant in the community. Furthermore, the importance and conspicuousness of subordinate offices do not increase in proportion to the increase of population. The clerk of a court or a county surveyor is not a more conspicuous officer because he holds his office in a county having over two million inhabitants. He is, therefore, proportionately less conspicuous and important as the population increases. The voter is, therefore, constantly

presented with candidates whose reputations are in inverse ratio to the size and population of the electoral district. The more electors there are in the district the smaller in proportion is the reputation of the candidate. The more the character and qualifications of the candidates are hidden, the more difficult it is for the voter to obtain the information which he should have in order to vote intelligently. For instance, the 600 voters in the village where the writer resides are called upon to select a clerk, a treasurer, a marshal and collector, 2 police magistrates, and library and school trustees. In so small a community the voter may with some effort actually know who the candidates for these places are. As a matter of fact, however, that effort is considerably more than the large majority of voters will push themselves to perform. The 2,000 voters in the township where the writer resides are called upon to elect a supervisor, a clerk, an assessor, a collector, a commissioner of highways, 5 justices of the peace, 4 constables, a poundmaster, and high-school trustees. These offices are not in-

trinsically more conspicuous or more important than the village offices just enumerated. Hence the enlargement from 600 to 2,000 voters causes the candidates for office to be proportionately less conspicuous in the community. To the same extent the difficulty to the voter of obtaining information as to the character and attainments of the candidates has been increased. The members of the state Senate and House of Representatives are important officers because they exercise the legislative power of the state. The conspicuousness and importance of each of these offices is, however, weakened by the existence of the other, for between the representatives and senators the legislative power is divided and each is a check upon the other. The members of the House of Representatives in the state legislature are hidden to some extent from the voters because 3 are elected at large from a senatorial district containing 18,000 voters. It is more difficult for the voter to find out about a legislator when he is one of 18,000 than when he is one of 6,000 voters. Twenty-eight thousand electors of the

County of Cook outside of the city of Chicago are called upon to vote for 5 of the 15 county commissioners. The office is not likely to be held by men whom it is easy for the average voter of the district to pick up direct information about. To elect one member of the state Board of Equalization 42,000 voters are called upon. Again, the size of the electorate makes it difficult to know who the candidates for the place may be. Three hundred and twenty-two thousand voters are called upon to elect 7 sanitary trustees. Here the darkness of the average voter becomes Egyptian, and he is practically excluded from any means of a personal knowledge of who the candidates for the sanitary trustees are. The same is equally true of the members of the Board of Review, members of the Board of Assessors, the 30 judges of Cook County, the president of the Board of County Commissioners, the judge of the Probate Court, the judge of the County Court, the state's attorney, the recorder, the 5 clerks of the different courts, the sheriff, the county clerk, the county superintendent of

public instruction, and the county surveyor. There are 350,000 voters who regularly cast their ballots for these officers. Among a population containing so many voters it is practically impossible, even for the voter who makes an unusual effort, to acquire any personal knowledge of who the candidates for these offices are. Take the most prominent officials in the list—the judges and state's attorney. The intelligent man who is a voter has very little chance to acquire any personal knowledge of the fitness of the candidates for these offices. A particular judge or a particular candidate for state's attorney may become to some extent known to the voter and have the confidence of the voter. But these are exceptional cases. The average candidate for these offices is beyond the reach of any thoroughgoing knowledge on the part of the voter. The difficulty of obtaining information about one inconspicuous member of so large a population is too great. In Illinois, to select a secretary of state, an auditor, a treasurer, a state superintendent of schools, 6 trustees of the state university, a

clerk of the state Supreme Court, and 2 congressmen at large, 1,100,000 voters are called upon. Here again the inconspicuousness of the offices compared with the size of the electorate is such that the obstacle to the voter informing himself about candidates is practically insuperable.

One would think that the voter had difficulty enough in finding out about candidates as a result of the simple process of requiring comparatively inconspicuous and unimportant offices to be filled by a very numerous electorate. But his difficulty has been enormously increased by the process of requiring the voter to do the larger part of his investigating for the purpose of voting at a single election. For instance, the writer is called upon at a single election in November to investigate the qualifications for office of a president and vice-president of the United States, a congressman for his district, 2 congressmen at large, about one-half of the state officers, and about one-half of the county officers. To be exact, he must look up candidates for 34 different offices

(not including the presidential electors) presented upon the long ballot given *supra* (opposite p. 29), to the number of 181. Assuming that information about some of the candidates for the more important offices, such as members of Congress and members of the state legislature, could be looked up and reliable information obtained, the chances are that this will not be done because other more important offices, like that of president of the United States and governor of the state, are to be filled. This process of preventing the voter from investigating candidates for even important and conspicuous offices by putting so much investigating upon him at a single election that he cannot do it has operated to produce political ignorance on the part of the electorate as to candidates for Congress and the state legislature. These are important and conspicuous offices. The candidates come from comparatively small districts. If selected at an election where they were the only offices to be filled, a very considerable amount of intelligence might be displayed by the electorate. But these

offices are hidden among half a hundred other offices for which several hundred other candidates are running. In the mass the voter is distracted and fails to a considerable extent to distinguish the important from the unimportant. The extraordinary amount of investigating to be done overwhelms and discourages him, and he goes to the polls too frequently utterly ignorant of the qualifications of candidates for members of Congress and the state legislature.

That the decentralization of governmental power and the increased application of the elective principle has necessarily cast upon the electorate an enormous burden in order that it may vote intelligently is clear enough from the everyday experience of the voter at the polls. At least one political scientist has directed an experiment to emphasize it. President Judson, a few years ago, gave to a graduate class at the University of Chicago, four weeks before the regular fall election in Cook County, a list of all the candidates for office on a ballot substantially similar to that which appears

*supra* (p. 29), and required them to report at the time of the election such facts as they could ascertain about the candidates and their qualifications. With diligent work on the part of the really mature men in Dr. Judson's class a satisfactory report was turned in with regard to only a small percentage of the entire list. This, Dr. Judson thought, fairly indicated what the average voter could do on his own responsibility in the way of securing information respecting candidates if he had spent the same amount of time with that object in view.

Not only is it obvious that the voter is under a great burden with respect to seeking and securing information about the candidates for office he is called upon to vote for, but it is clear that the task is so great as to be impossible of fulfilment by the large mass of the electorate who have their place in competitive industry to maintain. A small handful of intelligent men of commanding position in the community, after many years of experience, may be able with comparatively little expenditure of time to inform themselves accurately concerning a

large number of the candidates of the two or three principal parties on the ballot. But the average man whose position in the community and experience with affairs is more limited could not obtain the proper amount of information without an actual neglect of his business or profession—a neglect which he dare not permit. The voter who occupies a salaried position which demands a full day of work for his employer throughout the year has no time, inclination, nor opportunity for prolonged investigation into the qualifications of candidates for public office. The residuary mass of the electorate have neither the time, the experience, nor the interest to investigate in advance and inform themselves of the qualifications of candidates to be presented for a large number of offices.

### Section 3

The Resulting Political Ignorance of the Voter and His Consequent Disfranchisement

Of course, there is some political ignorance due to illiteracy and general lack of intelligence. With this, however, we are not now principally

concerned. It is here assumed that except in small and exceptional districts the great majority of voters are neither illiterate nor unintelligent, but are of a fair average intelligence and capable of reaching and following sound moral and political judgments. The fact which is now to be emphasized is that the burden upon the voter is such that the vote of the most intelligent man is made quite as politically ignorant as that of the least intelligent. The percentage of politically ignorant voting has become very high, not because the voter is unintelligent, but in spite of the fact that he may be extremely intelligent. An electorate that is capable of casting an 85 per cent intelligent vote on a given matter of importance has, by the simple process of requiring the voter to vote too much, been reduced to the voting effectiveness of a Filipino who is not yet ready for popular institutions. To the extent that our intelligent voter has thus artificially been made ignorant in the discharge of his political duties he has been disfranchised. Too much of what

popularly passes for democracy has resulted in too little real democracy.

When the voter faces in the voting booth such a ballot as that already exhibited *supra* (opposite p. 29), or even a much simpler one, he has no time to analyze his condition of knowledge or ignorance. He must vote quickly and be about his business. If we could secure a revelation from the voter of the state of his mind as he faces the ballot, would not his condition of ignorance be appalling? He would, of course, admit that he knew nothing of the duties of a large number of the offices to be filled. He would admit that he knew nothing of the qualifications of a large number of the men who were seeking office. Indeed, many of them he would never have heard of. The average voter would no doubt have prepared himself, by reading, by following events, and by discussing the matter with other voters, to vote for a particular candidate for president of the United States. From the same sources he might acquire a personal preference among the candidates for governor of the state. He

might have a personal preference founded upon some actual knowledge or current rumor as to the proper candidate for congressman or member of the state legislature or president of the county board. He might be satisfied that some one of the several candidates running for several vacancies on the bench ought to be elected. It is hardly probable, however, that he will have any personal preference founded upon any actual knowledge as to the candidates for all these places at once. Outside the candidates for three or four places he will be utterly and entirely devoid of any personal knowledge upon which to base an intelligent vote.

To make this position more concrete I will describe my own state of mind as to the ballot illustrated *supra* (facing p. 29). I never heard the names of any of the candidates on the Socialist Labor, the Socialist, or Prohibition tickets except those of Debs and Chafin, and of these I had an impression about the qualifications for office only with respect to Mr. Debs. On the Democratic ticket I think I was intelligent with respect to Mr. Wilson's

candidacy for president and Mr. Dunne's for governor. I had some personal knowledge regarding one candidate for a trustee of the state university, the candidates for state's attorney and for president of the Board of County Commissioners. The other names on the Democratic ticket meant nothing to me. On the Republican ticket I regarded myself as informed sufficiently to vote intelligently on Mr. Taft's candidacy for president, and Mr. Deneen's for governor. I had some personal knowledge regarding one candidate for representative at large in Congress, the candidates for representative in Congress from the congressional district, and for president of the Board of County Commissioners. Of the remaining thirty-nine names on the Republican ticket I recognized one as that of the son of a war governor, one as a former attorney-general, one as a former county judge, three seeking clerkships and the office of coroner, as the incumbents of the offices for which they were running, and one as a lawyer with whom I had some personal acquaintance. The

names of the other candidates at the time I voted meant absolutely nothing to me. On the Progressive ticket I was intelligent with respect to Mr. Roosevelt's candidacy for president and Mr. Johnson's for vice-president; also to the candidacy of those seeking the offices of attorney-general and representative to the state legislature. I had some acquaintance with one of the candidates for trustee of the University of Illinois, and one of the five candidates for county commissioner. The rest of the names meant nothing whatever to me.

If the offices which the voter was called upon to fill while politically ignorant were few in number and altogether insignificant in the extent of the governmental power which they controlled, not much harm would be done. But little by little, as population has increased and social and governmental organization has become more complex and the political duties of the voter have grown heavier, the political ignorance of the voter has extended to a constantly increasing number of candidates for office, until the sum total of the governmental

power of all the offices for which the voter casts his ballot in political ignorance constitutes the principal part of the entire local and state governmental power. The great sources of governmental power are the Congress of the United States, the legislatures of the state and local governments. When the tide of political ignorance on the part of the intelligent voter rises so high that it embraces the candidates for the local, state, and federal legislative bodies, the situation is serious. When it includes the local judiciary and all but the president of the United States, the highest executive officer of the state and of the principal local government, the situation has become desperate.

So far as the electorate is too ignorant to vote intelligently it has been in effect disfranchised. It does not really vote at all. If the voter were required to vote blindfolded, or if the ballot were made up in cipher, he would know that he was disfranchised. Suppose, however, that the voter is blindfolded or the ballot done in cipher only in those instances where the voter is called upon to

vote without any political information necessary to enable him to vote intelligently. Would he be any worse off because of the cipher or the bandage on his eyes? Does not the political ignorance of the voter as clearly deprive him of his power to vote as the use of a cipher or blindfolding? In both cases he goes through the mechanical act of voting, but he records nothing at all by so doing.

The ignorance of the voter and his consequent disfranchisement follow necessarily from our present plan of government. They result immediately from the burdens placed upon the electorate. Those in turn arise from the application of the two principles of government which we have constantly heretofore applauded and proclaimed—the decentralization of governmental power and the principle that all offices of any consequence should be elective. These principles of government are still regarded by the mass of the people as the true and only sources of democracy and the necessary protection of the people from all forms of unpopular government. The application

of these principles is in varying degrees protected by state constitutions which provide for the separation of the powers of government, both state and local, among departments and officers, and require local as well as state subordinate officers to be elected at frequent intervals.[1] Thus do the letter and the spirit of our governmental theory and practice necessarily induce the wholesale ignorance and consequent disfranchisement of the large majority of the electorate in regard to candidates for offices, which, when filled, wield a very large,

[1] In Illinois, for instance, the following state and local offices are provided for in the state constitution, protected by the state constitution, and required by the constitution to be filled by election: governor, lieutenant-governor, secretary of state, auditor of public accounts, state treasurer, superintendent of public instruction, attorney-general, judge of the Supreme Court, clerk of the Supreme Court; in counties outside of Cook County: the county judge, state's attorney, sheriff, county clerk, treasurer, recorder, coroner, clerk of the Circuit Court, county superintendent of schools, judge of the Probate Court, judge of the Circuit Court; in Cook County: 15 county commissioners, judge of the County Court, 14 judges of the Circuit Court, 18 judges of the Superior Court, state's attorney, recorder, coroner, sheriff, county treasurer, county clerk, clerk of the Circuit Court, clerk of the Superior Court, and county superintendent of schools. This includes all the state and local offices named in the long ballot printed opposite p. 29, except 3 trustees for the state university, 3 representatives in Congress, 1 member of the State Board of Equalization, 2 members of the Board of Assessors, 1 member of the Board of Review, the county surveyor, and 3 trustees of the Sanitary District.

if not the larger, part of the state and local governmental power.

Formerly unpopular government was founded upon the absence of any voting. Today the electorate, while voting furiously, has nevertheless been deprived to a large extent of the ballot because a burden of knowledge—an educational qualification, in effect—has been placed upon it which, under present conditions, it does not and cannot fulfil. Thus, by the simple process of too much so-called popular democracy—that is, too much decentralization of governmental power and too much voting—we have arrived at the essential condition which invites the establishment of unpopular government—namely, the disfranchisement of the electorate.

### Section 4

#### The Power of the Electorate Passes to Those Who Take Advantage of Its Political Ignorance to Direct It How to Vote

The severe educational qualification which has been imposed upon the electorate today has done more than merely deprive the voter

of the power to vote. It has presented to others the *opportunity* to direct the voter how to vote and thus in effect to cast his ballot for him. That opportunity has at once been taken advantage of by men who have been quick to perceive the vast political power which the privilege of casting the voter's ballot for him confers. This combination of opportunity and selfish motive is the complete cause of the passing of a considerable part of the political power of the electorate at large to the few who direct it how to vote. It is important that the way in which the effect follows from the causal conditions be set forth in as detailed and precise a manner as possible.

The voting for a large number of the most important offices in the state and municipal government is done during a few hours on election day. In these few hours great masses of voters come face to face with such a ballot as appears opposite p. 29. They have no opinion as to any of the candidates except a very few, for the most part at the head of the ticket. They do not, however, because of

their ignorance refrain from voting. Neither do they pitch a coin to decide for whom they shall vote. They insist on voting, and they take their voting seriously. It follows that when they are politically ignorant they vote the way they are told to vote by somebody. The important questions are: Who tells them how to vote? and By what means are they told? The small minority, including many of the most intelligent, vote the way they are directed by some newspaper. At one time a prominent newspaper in Chicago was credited with the ability to direct about one-tenth of the voters in a county or city election how to cast their ballots. But this was possible only when the newspaper concentrated its entire influence on the filling of one or two offices. The newspaper gives very little advice to the voter with respect to the filling of a considerable majority of offices for which elections are held. Even as to the few offices with regard to the candidates for which the newspaper makes a great effort to advise voters, its influence is limited. A large proportion of the electorate vote the

party circle. Some are moved by sentiment or strong prejudices; others by the fact that men of whom they know something personally are responsible for the nominations or appear as candidates in a prominent place on a particular ticket. In every case a vote in the party circle, which is a blanket vote for a great number of party candidates of whom the voter has no knowledge, is a vote according to the direction of those who promoted or directed the nomination of the men who appear as candidates in that party column. It is believed, however, that a very large body of voters—especially in districts where large numbers are generally ignorant or illiterate—need, and indeed must have, advice as to how to vote from some individual whom they either look up to and trust, or fear. These voters do not ask for political leadership. They do not desire information upon which to found political opinions. All they ask for is advice as to how to mark their ballots. In congested centers of population this advice is sought within a few hours in a single day by tens and even hundreds

of thousands of voters. The voter wants information as he approaches the booth. Even those who allow a newspaper to direct them how to vote need advice in voting for offices which the newspaper ignores. So the practice of independent voting and splitting tickets causes the voter to seek advice from those who make it their business to know something about the candidates. If these masses do not obtain instruction and advice as to whom to vote for they must refrain from voting, or pitch a coin, or fall back upon the party circle. They do the last as the most rational, and thus take the directions of those who are able to place the names of candidates under the party circle. In brief, the entire situation is something like this: As to four-fifths of the candidates for office the voters are politically ignorant; yet they insist upon voting and in taking seriously their duty as a citizen to vote. They will not pitch a coin. Hence they must vote the way they are told. Nine-tenths of the voters who cast ballots for four-fifths of the offices are directed to vote by those who have placed the

names upon the ballot or by someone who makes a special appeal to the voter at the polls or by a special canvass before election.

Not only, however, does the political ignorance of the voter present an obvious opportunity to someone to direct him how to vote and thus cast his ballot for him, but an overwhelming self-interest on the part of individuals invokes at once the strongest motive to use the opportunity. The man that can control the power of the electorate will secure the power to appoint to office. He who can regularly place the candidate in office will soon control the holder of the office and exercise the governmental power which the officeholder wields. The securing of such governmental power has always been an object in itself to a proportion of the individuals in every community. When seen as a source of personal profit and advancement, the numbers who will strive for it and the efforts which they will make are greatly increased. Indeed, the prize which the successful secure is such as to produce the keenest competition and the most exhaustive effort.

It is important to notice that the necessities of candidates quickly reveal the extent of the political ignorance of the voter and the opportunity which this affords for someone to direct him how to vote. The candidate, of whom the vast majority of voters are politically ignorant because his office is obscure and inconspicuous, finds that his election is not a matter of his policies and efficiency, but of the efforts of workers at the polls and the canvassing of voters before election. Such a candidate needs the support of successful advisers to the politically ignorant voter. He needs the support of that man or combination of men in the community that can cast the largest number of votes of the politically ignorant. A little experience in fulfilling this apparently innocent and legitimate demand for a campaign manager will reveal to the manager the character of the voter's political ignorance and the fact that someone must always direct him how to vote, and that this is the means by which political power is to be secured. A slight actual experience is all that is necessary

to point the real path to the exercise by the few of governmental power.

Such conditions of opportunity revealed and ever-present selfish motives must inevitably produce men who aspire to be successful advisers to the electorate. Active competition for these places naturally ensues. Success, then, means the survival of the fittest. That means that among the professionals those win who take their profession seriously, understand it thoroughly, and practice it assiduously and with judgment, tact, and craft. Here, then, we have the local political boss or professional politician. He is merely the successful local adviser and director to the politically ignorant voter. He is the man who can, more than anyone else, in a local district, direct the largest number of the politically ignorant how to vote. He advises and directs the voter how to vote principally by personal canvasses of the voters and solicitations at the polls and by controlling the machinery of nominations so as to determine who shall appear as a candidate under a given party name. The political

ignorance of the voter is one of the necessary conditions to his existence. The fact that most voters cannot make a show of voting intelligently without someone to help them provides the opportunity which calls him into being. The power of the successful adviser and director to the voter is in direct ratio to the political ignorance of the electorate. It makes no difference whether that ignorance be the result of general lack of intelligence or be artificially produced by placing a special educational qualification upon the voter which he cannot or will not fulfil. To the extent that the adviser and director of the politically ignorant voter can direct and advise the voter how to vote, he can fill the offices of the state and local governments with those who are loyal to him, and thus control some part of the power of government.

Since the business of directing the politically ignorant voter how to vote has fallen into the hands of a professional class and since the prize to be won is the control of governmental power, it is not to be wondered at that the

profession has become highly organized for the purpose of achieving its object; that men of extraordinary power and ability have arisen as its leaders, and that to a very great extent the object of the organization has been achieved.

The political boss or adviser to the politically ignorant voter first appears in the smaller election districts. His advent is coincident with a certain degree of political ignorance on the part of the electorate. At first that ignorance was the result of the actual illiteracy which appeared in the majority of the voters of a particular district, usually in a large city. Thus we first hear of the ward boss in our larger cities. His ward usually contains a large foreign population living in the densest political ignorance, easily terrified, easily cajoled, and easily corrupted. The steady increase in the length of ballots and the burden placed upon the electorate soon, however, began to produce artificially a state of political ignorance on the part of the most intelligent electorate. This at once produced the politi-

cal boss for districts where the electorate was possessed of a high average of character and intelligence. This boss was of a different type from a river-ward boss. It took longer to make him. He was of a somewhat finer grain. He had some inkling of the fact that he really bore a fiduciary relation to the politically ignorant electorate whom he advised and directed and whose vote he cast. He had to possess himself of the confidence and the trust of his constituents. His success was obtained only by close attention to his profession and by qualities of tact and leadership. His supremacy was retained only by care and subtlety. The moment each one of any considerable number of local election districts developed such a professional political boss it was inevitable that they should begin to act together to direct and advise the politically ignorant voters of the larger districts how to vote when it came to the filling of a more important office in a larger election district. Thus the bosses of the city wards and the country districts combined to agree on who should be presented

to the voter for election and to direct the voter how to vote. Naturally out of the combination some men emerged capable of leading the combination of bosses. Thus arose the city or county machine. In extraordinary instances a single man became a city or county boss for a particular party organization. In the same way, when the districts of a state were well provided with permanent political bosses, there was a movement among the leaders to combine into a state machine. Again, in extraordinary cases a single man was great enough to be the supreme political leader of a political party organization in a state and to lead it regularly to victory at the polls.

Thus almost imperceptibly, but with astonishing rapidity, there have been developed state-wide feudal organizations for the purpose—in form at least—of advising the politically ignorant voter how to vote, but in reality for the purpose of casting his vote for him, and thus securing the political power of the electorate. In each smallest election precinct there is a regular band of workers under a precinct

captain. In each collection of precincts which make the smallest electoral district, like a ward in a city or a township in the country, there must be a mesne lord whom the captains obey. In larger election districts, such as a city or a county, or a combination of counties, there must be tenants in chief over the mesne lords. Finally, there is the great lord paramount for the whole state. No precinct captain is permitted to have any idea of principles or policies. It is his duty, with his aids, to produce delegates for conventions who will vote as the organization chiefs direct, canvass the precinct before election and buy, command, instruct, persuade, or coerce, as the exigencies of the case may require, votes for the candidates named by the organization chiefs. When the precinct captain and his workers fail to perform these services successfully, out they must go, and others, waiting eagerly for promotion, will take their places. When they show ability they will make progress in the organization. The district boss must equally keep his captains in obedience and effectiveness. For him

also there is promotion or reduction to the ranks in prospect. It is the law of life and the source of the organization's power that its officers render implicit obedience to their immediate chiefs and that a mighty personality direct the whole.

Thus does the power of the electorate pass to those who take advantage of the political ignorance of the electorate to direct it how to vote.

### Section 5

**The Power of Government Passes into the Hands of Those Who Are Able to Direct the Majority of the Politically Ignorant How to Vote. They Constitute an Extra-legal but None the Less Real Government**

The professional adviser and director to the politically ignorant voter aims to secure control of as much of the power of government as possible. His means to that end consist in becoming the most important single factor in the filling of the offices of the legal government. Success in advising and directing a majority of the politically ignorant voters how to vote places in his hands the power to fill by appointment all offices for which candidates are pre-

sented who are unknown to the electorate generally. Our political boss naturally tends to appoint men who are loyal to him and to his power, and by this means he naturally secures a certain control over part of the local governmental power. In the same way, the prize of a combination of successful local bosses is the power to appoint the majority of the officeholders of some more extensive and important local municipal government and thus obtain control of a part of its governmental power. When the state-wide organization of the feudal army of directors and advisers to the politically ignorant voter has been thoroughly perfected, with a man of great ability at its head, the prize to be obtained is the principal part of the entire governmental power, whether state or local. More and more such an organization will fill with men loyal to its leaders the local and state legislative bodies, the local and state executive offices, and even places upon the bench. Such an organization, when continuously successful for any length of time, will have actually filled all of the less

conspicuous and less important offices in the executive, legislative, and judicial departments of the state and local governments.

But the influence of such an organization will go farther than this. Being in existence and efficient, it will often be a determining factor in nominating and electing a candidate for an office so important, and, viewed by itself, so conspicuous, that in a special election to fill that one office the intelligence of the electorate would be displayed at its maximum. For instance, if we look at the federal government alone, we find that the voter casts his ballot only for president, vice-president, and usually only one congressman. The congressman is selected for the most part from a fairly small district. Taking the federal government by itself, the voter's function in selecting a congressman is so simple and direct that no professional advice or direction is needed except in the unusual case where the district is filled with an actual illiterate vote. But the moment the vote-directing organization is called into being in the congressional district

because of the artificially produced political ignorance of the voter in respect to candidates for various local municipal offices and state offices, such an organization at once exercises an important control over the nomination and election of the congressman. In the same way the organization will gain a very considerable influence over the nomination and election of candidates for local municipal offices where they consist only of the mayor and an alderman from each ward, who are elected at a special election. Such an organization will have at all times a vast influence in the nomination and election of judges, even when they are chosen at a special election. There is no doubt that the nomination for governor of the state and president of the United States may from time to time be greatly influenced by politocrats whose power is based upon the political ignorance of the voter in respect to candidates for all manner of obscure offices in the state and local governments. Speaking generally, if the voter is habitually so ignorant politically that the politocrats have secured,

to a considerable extent, the power to direct him how to vote, then the politocrats will exercise a great deal of influence in determining who shall be elected to offices so conspicuous and important that if they were the only ones filled by election the voter would exercise a high degree of independence and intelligence in making his selection and the services of the same politocrats would be wholly dispensed with.

A vote-directing organization which is steadily successful in a given state or local government for eight years will reach a point where it actually places in practically all the state and local offices that are filled by election, and also in the House of Representatives, in Congress, and in the United States Senate, men who are loyal to the organization and its leaders before everything else. The leader of such an organization may even have obtained a controlling influence with the governor of the state and the president of the United States, so far as their power extends to local appointments and affairs. When this occurs, the leaders of the state and

local vote-directing organization have become the real though extra-legal government. The real power of government, both state and local, and an important influence in the power of the federal government are in their hands. Local and state executive officers and local and state legislators will take orders from these leaders. Judges in a more subtle way will take account of their wishes.

Thus we have, however imperceptibly, none the less effectively changed the character of our government. The very excess of our precautions to prevent the power of government from coming into the hands of the few has delivered the power of government into the hands of the few. So obviously and completely has the elaborate effort of our constitution-makers failed to keep governmental power out of the hands of the few that we might as well accept it as axiomatic that governmental authority in any highly organized society cannot be prevented from becoming concentrated in the hands of the few. Our form of government has indeed changed from the decentralized

democracy of the frontier to the centralized politocracy of a highly organized civilization. We have turned our back upon the autocrat and the aristocrat only to find ourselves in the hands of the politocrat.

### Section 6

**The Extra-legal Government Uses Its Power Selfishly to Maintain Itself and to Benefit Those Who Have Organized and Supported It**

Our extra-legal government is not one of altruists. It may be relied upon to act selfishly in two respects: First, it will use all of its influence and power to maintain itself. Then as its tenure of power becomes more secure it will use that power to reward the leaders who have organized and supported it.

The clear perception of what is necessary for the maintenance of the extra-legal government will provide the wise politocrat with a deep-rooted political philosophy. His creed, if uttered, would sound something like this: "I believe in the disfranchisement of the voter by keeping him too ignorant politically to vote intelligently. I believe that all voters, no matter how intelligent in general, can be made

politically ignorant in voting by placing upon them a burden of investigating candidates and attending elections which they can conceivably, but will not in fact, perform. I believe that such a burden upon the voter can be produced most readily by the decentralization of governmental power in every possible way, and the constant application of the elective principle. I therefore believe in fostering the popular fear of kings, the popular prejudice against the centralization of power and the filling of offices by appointment. Above all I believe in more democracy (i.e., more applications of the elective principle) as the cure for the ills of democracy."

With these deep-seated convictions, the course of action of the wise politocrat in many respects is not difficult to predict and not difficult to understand when it is observed. The chief executive of the state or of the United States who, in response to any popular demand, attempts to influence or coerce the legislature must be publicly rebuked. It must be pointed out that he is overstepping the

bounds of his constitutional power. He must confine himself to the limited constitutional sphere of the executive. When a man becomes governor or president he must cease to be a citizen. The promotion of decentralization of governmental power through the creation of several new municipal corporations operating in the same district is a step which should always receive the favorable attention of the politocrats. The constant application of the elective principle to each newly created office must be maintained. The election district furthermore should always be kept as large as possible and always larger than the personal reputation of anyone who would be likely to seek a given office which the voters of the district select. Methods of redistricting can be devised and carried out so as to yield the maximum amount of power for the extra-legal government for the time being in power. Election laws must be so shaped and administrative acts so directed as to enable the organization to marshal its votes in the most effective way. New parties and independent movements

must be discouraged. One of the neatest devices to effect such discouragement is to retain the party circle and at the same time provide that no candidate shall appear on more than one ticket on the ballot. That will force all candidates who can secure the extra-legal government's party nomination to take it as against an independent nomination. The fact that the extra-legal government puts up some men who are satisfactory and who cannot also be placed upon an independent ticket will discourage the putting in the field of any independent ticket. No harm will be done to the extra-legal government by politocrats if the network of governmental bodies becomes very complex, or if the details of carrying out provisions of election laws become so difficult to understand that the whole machinery of elections must be directed by a few experts.

But the chief care of the wise politocrat will not be to acquire a selfish political philosophy or a selfish program for governmental legislation. Of paramount importance is the organizing, recruiting, training, feeding, and caring for

the feudal army of directors and advisers to the politically ignorant voter and the rewarding of the officers and lesser leaders of that army according to their position. So far as possible, of course, the district and precinct workers will be given places upon the public pay-rolls and so fed and clothed from the public treasury. In return for what they receive from the public they will do the minimum amount of work for the public and the maximum amount for the organization. Places on the pay-rolls of private corporations may also be at the disposal of the leaders among the politocrats. In a city of any size much small graft connected with the issuing of licenses of all sorts, the selling of liquor, the business of vice, and the activities of the underworld may be picked up by the privates and captains in the organization. The lesser politocrats will take the higher salaried positions and fee offices. It will not interfere with their obtaining these places that they must submit to an election. The work of the office will be done by a chief deputy paid out of the public treasury. The holder

of the office will, therefore, be enabled to spend his entire time conducting the business of advising and directing the politically ignorant voter whom to vote for. The larger graft connected with the protection of the business of vice and the activities of the underworld will go to those who are still higher up among the politocrats. This, however, is a dirty and risky mode of reward and the protection which can be given has its limits. Many politocrats, and among them the most powerful, will not touch it personally. In certain districts men of excellent social standing and mental attainments can be used to advantage by the extra-legal government. In most instances material of this sort can be drawn from among lawyers. The reward for those who are constant and effective in their service will be a place in the corporation counsel's office or the state's attorney's office, and finally a place upon the bench. The larger graft of public contracts is reserved for the overlords of the feudal organization. But even this the great leaders will not touch.

The great prize which is reserved for the lord paramount and his tenants in chief is the privilege of entering into an alliance, offensive and defensive, with special business and property interests which need the aid of the local or state governmental power to exploit to the best advantage the many, or the protection from governmental interference at the demand of the many who are being exploited. Indeed, so close may the relations become between the great captains of such special business and property interests and the extra-legal government by politocrats, that the real power of government may to some extent actually reside in the former rather than the latter. It will indeed be difficult in many instances to tell which group commands and which obeys. Where the leaders of both are equally able there will be a complete partnership.

### Section 7

### The Extra-legal Government Is Able to Maintain Itself in the Face of Popular Disapproval

The conditions under which extra-legal government exercises its power and the manner of

that exercise furnish it with certain considerable advantages in its very natural effort to maintain itself in the face of popular disapproval.

The extra-legal government has the advantage of being hidden from the electorate. The mass of voters can tell who only a few conspicuous officeholders in the legal government at any one time are. Of the existence of a thoroughly organized extra-legal government they have no real knowledge whatever. If they have some idea of machines and bosses it is vague and imperfect. They see only a little at a time and have no idea who it is that casts their ballots for them. The voter who masters such secrets is rare indeed. Even the very intelligent man who is a voter cannot tell anything in his own district about the extra-legal government. He only knows that there are bosses whom he never seems to have a chance to vote against. This secrecy on the part of the extra-legal government is an invaluable asset in enabling it to retain power. So long as extra-legal government remains

hidden, there is little chance of the voter causing it any serious damage.

The extra-legal government has a great advantage also in the fact that while it is the real government, the electorate is constantly voting for the legal but dummy government of officeholders. Of course, if the voter knew the connection between each officeholder and the extra-legal government he might vote intelligently, but that is information of the most secret kind. In many instances it is impossible for anyone to obtain it. Certainly it cannot be expected that a voter who is in ignorance of the qualifications and personality of most of the candidates for office will ever know what connection any of them have with a more or less secret extra-legal government.

The wise politocrat appreciates the advantage which his extra-legal government has in hiding behind the legal government and in the fact that his power is not subject directly to the approval or disapproval of the electorate. He knows, however, that from time to time some loyal adherent of the extra-legal government

will demand and must be given the nomination for an office so prominent that his record will be fully investigated and his relation to the extra-legal government become widely known. Then the existence of extra-legal government will, in the contest for that office, become an issue, especially if there be an independent anti-politocratic candidate. But experience will make it clear that such an issue must be avoided. The extra-legal government must drop as a candidate for an office of any prominence a man known by the electorate to be loyal to the politocracy. In his place may be put a fresh dummy or a real independent, as the exigencies of the case require. The former step is, of course, from the point of view of the politocrat, to be preferred. When, however, the outlook is dark and forbidding for the extra-legal government in power, its leaders will assent with a show of enthusiasm to the nomination of a Hughes or a Wilson. They know that the naming of an independent and popular man who is likely to be successful at the polls will enable their extra-legal government to

appoint to office the subordinate elective officeholders in the legal government. They know that a governor surrounded by independent subordinate officers and opposed by legislators selected by and loyal to the extra-legal government can do that government no permanent damage. They know that most men can, during their term of office, when placed in close contact with such opposition, be worn down and disheartened, so that they are glad to quit when the opportunity for promotion to a place where they need no longer war upon extra-legal government is tendered them. Thus, a popular governor may be induced to accept the position of vice-president or a place upon the Supreme Court of the United States.

The failure to observe this principle of action at the Republican National Convention of 1912 has started the most widespread and serious movement against extra-legal government that we have yet had. According to all the rules of astute politocratic management, the representatives of extra-legal government in that

convention should have acquiesced in the selection of the most popular and prominent leader available, in spite of the fact of his independence. They should have driven into power with him as many of their adherents as possible, or let him go down to defeat. Whichever happened, extra-legal government, as conducted by means of the control of an extra-legal oligarchy over successful candidates for office, would not have been disrupted and a general movement inimical to the whole basis of extra-legal government would have been averted. The revelation of the existence of a power in a few hands which could legally override popular desires in the selection of a candidate for the president of the United States, and the exhibition of what, to a large number of people, must have seemed to be the actual exercise of such a power, and the defeat of the popular will clearly expressed could have only the result of launching one of the greatest independent political movements of half a century, with its principal attack upon extra-legal government as it has grown up in the

United States. This is the same sort of mistake that the advocates of slavery made when they underestimated the unexpressed determination of the North to preserve the Union.

There are, of course, as many rival vote-directing organizations as there are political parties which have become established and have a name with any good-will attached. If two of these organizations are at all well matched and occupy practically the entire field, their leaders frequently make secret agreements according to which the governmental power is divided. One takes the city and the other the county, or one a great metropolitan district and the other the state. Such arrangements are preferred to a life-and-death struggle for supremacy. They result in a combination which it is exceedingly difficult for the politically ignorant majority of the electorate to overcome.

After all, however, do not the people rule? Does not the power of such extra-legal government continue by their choice? Can they not smash it if they choose? Theoretically,

yes; practically, no! The extreme decentralization of the legal government—the success of the constitution and laws in preventing the concentration of power at any one point in any one office in a legal government—is the very foundation upon which the existence of the extra-legal government rests. It is also the chief reason for its continuance in power. The paramount power of the electorate as a whole is broken into infinitesimal fragments by the constitution and laws providing for a multitude of independent offices to be filled by election. To turn out an extra-legal government which has filled practically all of the offices in the legal government the electorate must be vigilant, active, and successful, not in filling one office or a few offices at a single election, but in the filling of a hundred offices voted for at all the elections occurring during a period of from four to eight years. The extra-legal government stands as a solid, well-organized, single-headed army against a large but disorganized mass. The latter may triumph at points or on occasions, but it will

exhaust its strength in comparatively small and unimportant victories. Coming to the voting booth constantly handicapped by the densest political ignorance, without organization and without leaders, it falls again and again before the trained and permanent feudal army of vote-directors. There will be no serious danger to our extra-legal government from the electorate as a whole while the officers of the legal government are shorn of power or the opportunity by combination to secure power and compelled to face constantly an electorate ignorant of their personalities and their qualifications for office. It is one of the maxims of modern warfare that the important thing is to destroy or disrupt the opposing army—not merely to occupy a particular place or a particular territory. In the same way, in a war upon unpopular government, it is important to destroy or disrupt it, not merely to fill a few offices, or even many offices, with good men who are opposed to an extra-legal government which still continues in existence, ready again to seize the power of government

when occasion offers. So long as the real government is in an extra-legal oligarchy at the head of a feudal organization of vote-directors which remains unimpaired, while the popular army occupies for the time being a few offices denuded of power, the campaign has accomplished next to nothing. In a few more elections the extra-legal government will again have secured as complete control as before.

Even when monarchy was absolute and a popular uprising overthrew it by means of a successful revolution, the ultimate result was merely to substitute a new absolute monarchy for the old one. So with us today, when one extra-legal government by politocrats is overthrown by the extraordinary and prolonged efforts of the electorate, nothing happens ultimately but the substitution of a new extra-legal government for the old. The fact is that so long as we know of no other form of government except an absolute monarchy, or insist upon a plan of government which necessarily results in a decentralized legal government being controlled by a centralized extra-legal

government of politocrats, we shall never have any other form of government except a monarchy or an extra-legal politocracy. The tendency of the mass of the people to acquiesce in any governmental arrangement that they seem not to be able to escape from is a great asset to the maintenance of power by the extra-legal government. If it takes a supreme effort for a number of years successively to oust a present extra-legal government, and when the result of so doing is merely to substitute another extra-legal government of the same sort, what is the use of the extraordinary effort made? Why not advise the voter to concentrate his efforts from time to time in getting good men in the more important offices and letting the rest go? This attitude of mind becomes more and more common, especially among intelligent men who see the actual situation. It is substantially a surrender of all the offices to the control of the extra-legal government.

Such are the circumstances which a priori make the continuance of our extra-legal government, in the face of popular disapproval, prob-

able. The fact that it has and does now so continue is becoming every day more apparent. Suppose, for instance, at any time in the last ten years the direct issue could have been presented to the electorate whether they preferred government by an extra-legal oligarchy of politocrats, subject only indirectly and very slightly at any single election to the electorate, or a legal government, subject directly to the will of the electorate. Can there be any doubt that the great majority would vote the extra-legal government out of power and abolish politocracy as they would abolish absolute monarchy or a self-perpetuating oligarchy? If any demonstration of the temper of the electorate on such an issue be needed, we have it in the steady popularity of all measures which have been put forward aimed at the so-called political bosses and government by them. Twenty-five years ago it was apparent to the electorate that the ward boss in some districts of our larger cities maintained himself in part at least upon corrupt voting. Hence the Australian ballot. Then it was observed

that political machines supported their workers by salaries from the public pay-rolls. Hence the civil service acts. Then the extra-legal government's control over nominations seemed to be the true source of its power. Hence the direct primary. It was also observed that the extra-legal government had a grip on the state and municipal legislatures and the state and local executive offices and the judges. Hence the initiative, the referendum, and the recall. It was observed that the origin of the extra-legal government and the great source of its power came from the complexity of our municipal governments, their cumbersome administrative machinery, and the number of offices submitted to the electorate. Hence the movement for the consolidation of municipal governments and their control by a commission. It has been observed that the governor often expressed in a satisfactory manner the desires of a majority of the electorate, but that he had no power to initiate legislation. Hence the two recent proposals that the governor's bills be given the right of way upon the legislative

calendar so that they could be brought to a vote and not quietly strangled by the crowding of the legislative docket and the action of committees; and that the governor be allowed to submit for approval by the electorate generally any bill presented to the legislature and not passed by it.[1] The judges, especially those of the Supreme Court, were observed to be declaring laws, in favor of which there was great popular sentiment, unconstitutional. The courts were then at once placed by the electorate in the same camp with the extra-legal government—quite unjustly perhaps—and the demand arose for the recall of judges, or the recall of judicial decisions on constitutional questions, or in any event the greatest possible restriction upon the court's power to declare acts of the legislature unconstitutional, or the elimination of that power altogether. Finally, we have had most recently a new national party, which has been dedicated in general to the war on extra-legal government and to a program of governmental reform believed to be inimical to its

[1] *Post*, chap. xv.

existence. Every one of these movements upon analysis shows the electorate conscious of the deprivation of its power to express its will and to enforce responsibility to it from the officers of the legal government.

We are obviously in the midst of a great effort to meet an overpowering extra-legal governmental force which has been depriving the electorate of its power and legitimate influence in the functioning of the legal government. Such continued, increasingly aggressive, and always popular efforts to rid ourselves of extra-legal government by politocrats points very clearly to the conclusion that our state and municipal governments have in a greater or less degree fallen into the hands of that sort of government, and that it has been able for a generation, and is even now able, to maintain itself in the face of popular disapproval. A practical, workable form of unpopular government has, in spite of the precautions taken to prevent it, been established in the United States.

# PART II

## THE WAR ON POLITOCRACY

## CHAPTER III

### DISSIPATION OF POLITICAL IGNORANCE BY SELF-TAUGHT POLITICAL EDUCATION

If extra-legal unpopular government by politocrats rests upon a condition of political ignorance on the part of the electorate, then it will be said that the obvious cure is to dissipate that ignorance by political education. It would not, however, be suggested that this political education be compulsory and at the expense of the state by competent teachers. That would irritate the electorate, be expensive, and probably end in the establishment of a state-paid boss. No! The political education of the voter must be self-taught. He must be aroused to more knowledge and a more conscientious performance of his political duties; more investigating of the qualifications of candidates and greater efforts to secure the proper sort of candidates. He must spend the time necessary to perform all his political duties and to do so intelligently enough to make an

individual choice as to every candidate for every office at every election.

Many persons of intelligence will regard this as the only means of successful assault and permanent overthrow of extra-legal and unpopular government by politocrats. They are therefore content to sit still and await the millennium of self-taught political education which will enlighten the voter. The difficulty is that dissipation of political ignorance by such means will never occur. Since political education is not compulsory, we have to deal, not with the political knowledge which the voter might conceivably obtain, but that which he actually secures. The fact is the electorate is the sole judge of how much work it will do in securing political knowledge and performing political duties. On occasions it may be aroused to an exceptional activity; on other occasions it may do nothing at all. Obviously then, in order to obtain the highest percentage of intelligent voting on an average it is necessary that the political duties of the electorate be adjusted to the amount of self-taught and self-

acquired political education that the electorate will generally and in the long run secure. If the political duties and education required are out of all proportion to what the electorate will obtain for itself, then political ignorance and neglect of political duties follows as a matter of course and is a fixed and continuing condition. It is futile then to insist upon the performance of duties which the electorate will not perform or the attainment of a political education which the electorate will not secure by its own efforts and which cannot be had in any other way. The proper course is to readjust the political duties of the voter so that what he is called upon to do he will accomplish with the minimum amount of ignorance in view of the effort which he himself is likely to develop to inform himself and make an intelligent choice.

When, therefore, we find an extra-legal unpopular government by politocrats established by reason of the long-continued and increasing political ignorance of the voters, who are on the whole an educated and intelligent class of

citizens, the necessary inference is that the political duties of the voter and the requirements of self-obtained political education have been placed far beyond his willingness to perform, or perhaps even beyond the possibility of fulfilment by him. To insist then upon self-taught political education which the voter has not in the past and will not in the future and perhaps actually cannot secure is to all practical intents and purposes to ignore utterly the cause which makes the existence of extra-legal unpopular government by politocrats permanent. It offers no means whatever for ridding ourselves of such government.

## CHAPTER IV

### THE AUSTRALIAN BALLOT AND CIVIL-SERVICE ACTS

The evolution of the modern politocracy began with the ward boss in districts of our larger cities where voting was ignorant because the population was largely foreign, illiterate, and easily corrupted, cajoled, or frightened. The boss's methods of carrying elections were coarse. The business of vice and the activities of the underworld were protected and the corrupt and illegal vote increased to the utmost. Indeed, to the average citizen and his leaders it seemed that the power of the boss rested mainly upon the corrupt and illegal vote. They saw that the opportunity of securing this vote was large because of the loose method of conducting elections. At once advocacy of the Australian ballot law became a part of the fight against the boss. Voters must be registered in advance of election day and opportunity given to challenge all voters so registered. The ballot must be

secret, so that the corrupter could never be sure that the bribed delivered the vote which he had been paid for. The remedy proposed received an overwhelming popular approval a generation ago and elaborately drawn Australian ballot laws are now almost everywhere in force.

No doubt the Australian ballot laws were a needed and valuable reform indeed, but the power of the boss did not rest ultimately upon the illegal and corrupt vote. Fundamentally it depended upon the political ignorance of the voter. The power of the ward boss not only survived the Australian ballot laws, but it tended to increase with the spread of political ignorance on the part of the voter. Other bosses of a different type sprang up and ruled in districts where the corrupt and illegal vote was negligible, but where political ignorance prevailed among an intelligent population. Then a hierarchy of bosses became a machine and by means of the machine secured the control of the governmental power of a municipality.

In moments when the electorate turned its attention to the matter it observed that the

machine and its leaders practiced spoils politics on a large scale. Its workers were being cared for by means of salaries from the public treasury. Efficiency in the service of the machine was a more important qualification for office or employment than efficiency in the service of the municipality. Naturally the enemies of the extra-legal government began an agitation for civil-service acts which should take the places in the public service out of politics—that is, out of the control of the politocrats. Government employees must be appointed only from eligible lists made up by a civil-service commission after holding an examination designed to test the efficiency of applicants. Once appointed from such a list, the appointee must be protected in his position from a discharge based upon political reasons. The enemies of politocracy rallied to the support of the civil-service acts and an appeal to the popular disapproval of the extra-legal government in general secured very widely the adoption of civil-service principles.

No doubt the civil-service acts were necessary and valuable legislation, but the power of the

bosses did not rest fundamentally upon their ability to place their workers on the public pay-rolls any more than it had rested upon the corrupt and illegal vote. The power of the extra-legal government still was predicated upon the political ignorance of the voter. This cause not only lay undisturbed, but, with the increase in the number of elective officers, and the multiplication of local governments operating in the same territory, each with a corps of elective officers, it became more and more pronounced and widespread. Even the most intelligent man became by an artificial process politically ignorant and befogged. Local bosses became more usual, less coarse in their methods, and more able. Combinations of bosses secured more governmental power in widening areas of governmental control.

## CHAPTER V

### ALTRUISTIC EFFORTS TO ENLIGHTEN THE VOTER

A few astute friends of the electorate have perceived that the power of the extra-legal politocracy rested fundamentally upon the political ignorance of the voter, especially the political ignorance of the voter who was an intelligent man and who could render a valuable judgment if he could have the facts. This idea produced the Independent Voters' League, which through a small executive committee undertakes to gather facts and give out information to the voters about candidates for office. The electorate, of course, should be given information about all candidates in every election. But such a task is too large and (if indeed it be possible at all) would require more money than could be raised by subscription from a comparatively few people. These leagues therefore, when formed, have devoted all their energies to giving the voter information about



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the candidates for a single office. Thus in Chicago the Municipal Voters' League informs the electorate in each ward of the city about the candidates for aldermen and those alone. The Illinois Legislative Voters' League gives out information concerning candidates for the state legislature.

It has been noticeable that of the two the Municipal Voters' League has been the more effective. This is due in part at least to the fact that at the Chicago aldermanic elections the ballot is very short. In many elections the candidates for the aldermanic office and those alone appear upon the ballot. Thus the voter's attention is concentrated upon the candidate for a single office from a single district. The advice of the league is, therefore, more easily noted and remembered. On the other hand, the Legislative Voters' League attempts to advise the voter at an election at which are filled state, county, and judicial offices. The length of the ballot and the number of offices to be filled has already been indicated by the specimen ballot printed, *ante*, opposite p. 29. Naturally

the advice is lost in the babel of voices which goes up concerning the candidates for the important local, state, and national offices to be filled.

The bar primaries as they have been held in Chicago are the weakest of all these altruistic efforts to inform the voter how to vote. Such primaries are merely the expression of preferences by the lawyers of Cook County with respect to the candidates for judicial office. They do not characterize any candidate or give any facts concerning his record. Nor is any effort made to promote the election of the men approved at such bar primary. Where a large number of judges are to be selected by an electorate of several hundred thousand, the bar primary is very weak indeed in its function of giving information to the politically ignorant voter.

Practical experience would seem to indicate that altruistic efforts to enlighten the political ignorance of the voter who is an intelligent man, to be effective at all, must consist of non-partisan, direct, and personal criticisms of

candidates' qualifications and records. Even then not much can be done unless the election is for a single important office and the election district is wieldy[1] in size. Whenever the candidates about whom the voter is to be informed are only four or five out of two or three hundred running for fifty different offices, the information and criticism lose much of their force. If the altruistic effort were directed toward informing the electorate about candidates for unimportant and inconspicuous offices, not only would funds fail to be forthcoming, but its voice would be unheeded and unheard. Thus the limitations upon the effectiveness of the efforts of altruistic voters' leagues are very definitely fixed.

Of course, newspapers wield a great influence in elections, even when partisan in the dissemination of news regarding candidates and in their comments upon the news. But this exhibition of partisanship occurs largely with reference to

[1] I.e., "one not so large but that the candidate who is willing to run may be known with a fair degree of ease by the electorate and be able with the least expense to make a personal canvass" (see chap. xii, p. 148).

the head of the ticket or to candidates for two or three of the most important offices. The influence of a newspaper in advising and directing the voter how to vote when he is ignorant of the qualifications of the candidates and has heard no public discussion in regard to them, depends upon much the same considerations as does the influence of the altruistic voters' league. To be an effective adviser to the voter as to candidates for subordinate offices, about whom there is no public discussion, a newspaper must be to some extent at least non-partisan. It must be direct and explicit in its recommendations and characterization of the candidates. It must concentrate its efforts on some one point in the ballot and let everything else go. These rules are as a matter of fact regularly observed by newspapers. The practice of them very much limits the actual scope of a newspaper's power as an adviser and director of the politically ignorant voter.

## CHAPTER VI

### ABOLITION OF THE PARTY CIRCLE AND PARTY COLUMN

In a rough way it has long been perceived that the party circle and party column on ballots are a vital part of the machinery necessary to direct the politically ignorant voter how to vote. If the voter is not only politically ignorant but also illiterate, the party circle is about all he can use, and only by directing his attention to that can he be told what to do. If the politically ignorant voter is an intelligent man he needs the party column at least so that he may take its suggestion when he attempts to vote for candidates about whom he knows nothing. It is not strange, therefore, that, in the war on politocracy, the abolition of both the party circle and the party column have been proposed. The more remarkable fact is that such a proposal has received so little support. The fact is that with our long ballots the abolition of the party circle and the

party column would result either in a clumsy restoration of the party column by the furnishing of party lists to the individual voter, or else in a disfranchisement of the voter so startling and complete, and a governmental chaos so much more inimical to good government than the extra-legal politocracy, that popular support for such a movement has been generally withheld.

Imagine, for instance, the party circle and party column abolished for the state and local offices on the long ballot in Cook County reproduced, *ante*, opposite p. 29. We should then have a ballot with a single column to fill 34 offices, with 181 candidates, the Republican, Democratic, Prohibitionist, Socialist, Social Labor, and Progressive, all lumped together. The large majority of voters could not rely upon their own knowledge of the candidates to make an intelligent choice. The burden upon the voter is too great. If the electorate voted at random there would arise a political chaos in officeholding. The voter would be least likely to do this. If the voter felt he

could not vote at all he would be plainly and utterly disfranchised. The voter would undoubtedly enter the voting booth with a party list in his hand as the most rational method of securing advice as to whom to vote for. That would be in effect a restoration of the party column which had been abolished. No wonder then that popular sentiment cannot be aroused over the general abolition of the party circle and the party column where the excessively long ballot is placed before large numbers of voters at frequent intervals.

## CHAPTER VII

### THE PRIMARIES

Upon the first appearance of the professional adviser and director to the politically ignorant voter he became a power in the presentation of candidates for election. It was indeed an essential part of his business in advising the voter how to vote that he should furnish him with a candidate for whom the adviser and director could vouch. At first the adviser and director of the politically ignorant voter named only candidates in the smallest governmental districts. But as the power and influence of the vote-directing organization spread to larger and more important governmental areas its leaders continued to control the nomination of candidates for office. At first the friends of the electorate sought to meet the formidable advantage which the vote-directing organization possessed by reason of its power to control party nominations by laws which permitted the nomination of independent candidates by petition.

Of course, if the law provided that no candidate should appear on more than one ticket, independent nominations were likely to be very much discouraged. But even when the election laws were most liberal in permitting independent nominations, the vote-directing organizations were still able to hold the field against all but the most violent and revolutionary independent movements. In short, unpopular government by politocrats was still reasonably safe.

There were two reasons for this. In the first place, the vote-directing organization exists and prevails because the voter is ignorant with respect to the personality and qualifications of candidates for office. He must be advised and directed how to vote. The independent movement simply matches the strength of a temporary and sporadic effort to advise and direct the unorganized and inflamed but still ignorant voter how to vote, against a permanent and well-organized vote-directing machine. In the long run the latter will prevail. Secondly, the permanent organization for directing and ad-

vising the politically ignorant voter has always secured possession of a revered party name. This has heretofore given it an overwhelming advantage. It makes every independent an apostate of some party. So great has been the good-will of the two principal national parties in the last fifty years that independent movements have been confined largely to local elections, and even then it is difficult to obtain candidates because of the fear of party irregularity. Of these two reasons clearly the former is the more important. The two principal national parties of the last half-century might cease, but if the voter remained politically ignorant as before, extra-legal government would still go on. On the other hand, if the voter could be made politically intelligent at all elections and in filling all offices from the candidates presented, then extra-legal government would have to go and party names would not militate seriously against independent movements.

Nevertheless, when the friends of the electorate came to appreciate the failure of independent movements to make headway against the

extra-legal government they did not plan to attack the fundamental difficulty of enlightening the voter's political ignorance. Instead, they did as they had done before and sought a cure by attempting to eliminate the superficial and obvious cause. Mr. La Follette in Wisconsin thought that he could have no political success unless he continued to be a member of the Republican party. As matters stood, however, he could not obtain the nomination from that party because it was controlled by men who did not want him in office. Yet Mr. La Follette was more popular with the electorate who usually voted the Republican ticket than were the gentlemen who controlled the use of the party name. The obvious move for Mr. La Follette was to take the control of the party name from those who held it. This he did by means of legislation which permitted any candidate who could secure a plurality of votes of the Republican party voters at a primary election to use the Republican party name in the election for the office. This was merely a legal and orderly way of depriving an extra-

legal government of the advantage of using a revered and popular party name. That is the proper function of a primary election law.

The availability of the primaries might, of course, have been limited to situations such as Mr. La Follette created in the Republican party in Wisconsin—namely, when an independent in the party wished to wrest the control of the party name from an extra-legal government which had lost the confidence of the party electorate. If so limited its use would practically have been confined to the occasions when a well-organized revolt was in progress against the wing of a party in control of the party name. Such occasions would be infrequent because such revolts are infrequent. Extra-legal government having become established and having obtained control of the party name, the tendency would be to let the matter alone. Small uprisings in regard to nominations for some particular office might occur, but a well-organized, persistent, and ably led revolt such as Mr. La Follette has conducted in Wisconsin is the event of a generation. Illinois, and no

doubt many other states, are just as much in need of the leadership of a man like Mr. La Follette as Wisconsin. But no such leader appears. None seems likely to appear. Our state lines have very effectively excluded Mr. La Follette's efforts from every state in the Union except his own. The use of the primary as a means of permanently and wholly depriving an extra-legal government of its power to control the use of a party name must be regarded as unusual and extraordinary and not at all likely to occur.

The use of primaries, however, has not been limited to occasions when an organized attempt has been made to deprive the minority of a party of the use of the party name. Instead, primaries have been made compulsory and applied to the nomination of practically all elective officers. They must be gone through with, although there is no organized revolt against the usual nominating authority. This extreme application of the primaries has been justified on the ground that the holding of primaries would operate automatically and

regularly on all occasions to rid the electorate of control of the extra-legal government. Again, we have had a popular application of the theory that the cure for the ills of democracy is more democracy. If the number of appeals to the electorate which we had before the primaries did not do any good, we must have double the number of appeals. The futility of this course will be observed no more clearly than in the operation of the universal and compulsory primary.

Under the usual circumstances of normal conditions, when no organized revolt is being led against it, the extra-legal government will as effectively control the results at primaries as it does results at elections themselves. The permanent organization of advisers and directors to the politically ignorant voter will, of course, have a slate of candidates for nomination, just as it provided a slate of nominees under the convention system. There may be some independent candidates for nominations. Most frequently, however, these are obscure individuals who try for a nomination on the theory that they are no more unknown than the slate

candidates. The voter's burden has been doubled. Consequently his political ignorance, both at the primary election for candidates and at the election itself, is probably greater than it was at the election for office alone. At all events, the voter comes to the primaries (if he comes at all) just as ignorant of the personality and qualifications of candidates for nomination as he formerly did of the candidates for office. His ignorance may be so apparent that he does not vote at all. Perhaps he votes only for a few names that he happens to recognize. In either case his vote is negligible. The effective voter at the primaries is the one who votes for candidates for all places. He must, however, as a result of his dense political ignorance, vote the way he is told. As usual the most effective force for telling him how to vote is the permanent organization of advisers and directors to the politically ignorant voter. It is that organization which will most often carry the primary election which nominates candidates for most of the offices. In short, the extra-legal government will influence and control the results

of the ordinary primary just as it has influenced and controlled the results of ordinary elections. It is only in the language of the stump that the primaries enable the people to nominate. While an extra-legal government exists the people can no more nominate at primaries than they can choose at elections. Such precisely has been the experience in Cook County, Illinois. There, from the time the primaries first went into effect, the leaders of the two principal vote-directing organizations have made slates more or less secretly, secured the most favorable position for the slate on the primary ballot, pushed the slate at the primaries, and obtained the nomination in practically every case of the slate candidates. In primary elections we have an appeal to voters on matters apparently less important and conspicuous than the filling of the offices themselves. If the vote-directing organization can in the long run control elections to a majority of the offices, it can certainly in the long run control the nominations for those offices at the primary election.

We must not overlook one great advantage to the extra-legal government in making nominations at primaries instead of at conventions. In the convention the leaders of the extra-legal government were so openly and publicly the makers of nominations that they were in a degree responsible. They had to consider very carefully the popular temper in giving each candidate a place on the ballot. Under the primaries, however, the result is, in the language of the stump, "the judgment of the people." If, therefore, any black sheep slip into nominations for obscure places it is the fault of the people, just as it used to be the fault of the people when bad men were elected to office. The popular demand, however, for primaries is a confession that elections did not produce the choice of the people. Before long, experience with universal and compulsory primaries to make nominations for long ballots will indicate that they do not produce nominations by the people.

Not only is the compulsory primary for all elective offices entirely ineffective to break up

the power of the extra-legal government to direct the nomination of its loyal adherents, but in the long run its presence exaggerates the very condition which necessarily causes the existence of a centralized extra-legal government controlling a decentralized legal government. That condition is the burden of political duties cast upon the voter which he will not and very likely cannot possibly carry. It is that which makes him politically ignorant and forces him to fall back upon the assistance of the professional political adviser. When the primaries double the burden on the voter they increase twofold the necessity for permanent organizations for directing and advising the politically ignorant voter how to vote. Consequently, so far from disrupting an extra-legal government, the universal and compulsory primary makes its continued existence even more certain.

## CHAPTER VIII

### THE INITIATIVE AND THE REFERENDUM

Nicholas Longworth, when congratulated on his election to Congress, is reported to have said: "Election! I wasn't elected; I was appointed."[1] This contains a very real truth. As the power of the extra-legal government has increased it has gained a large and in some instances predominant influence in our legislative bodies and particularly the state legislatures, through its power to appoint members who would be loyal to it. Once obtained this influence may be used to protect certain interests from legislation which they do not want, but for which there may be a proper popular demand. It may be used also to promote legislation which the electorate is against or would be against if it understood the situation. When such a condition of affairs exists and becomes widely known, we have a demand for

[1] George Kibbe Turner, "The Thing above the Law," *McClure's Magazine*, XXXVIII, 575.

the initiative to compel the enactment of laws which the majority of the electorate wants but which the legislature will not pass. We have also a demand for the referendum to veto acts which the legislature has passed but which the majority of the electorate does not want.

Of course, in extraordinary and unusual situations, when the electorate is organized and led against some attempted act of the extra-legal government, the initiative and referendum may be used to defeat and discomfort the latter. But that is not a normal situation. It is the extraordinary and unusual occurrence. The real effect of the initiative and the referendum on the extra-legal government cannot be determined with reference to abnormal circumstances. It must be looked at in connection with normal everyday events. The usual and normal situation is that of political quiet. The extra-legal government governs from day to day and from election to election. The placing on the ballot at any election of a number of acts to be initiated or approved on a referendum

adds more burdens to the already greatly overloaded voter. He must now read over the acts, study their details, and understand the ultimate effect or possibilities of certain clauses. The legislation to be considered by the voter may be of relatively small importance to the majority of the voters, or the desire of the majority for the general object may be so great that the means are not to be considered. The ballot may contain counter propositions and additional acts upon the same subject. Some reformers might present one act and the extra-legal government another on the same subject. When these occasions arise, one thing we may be certain of: the average voter will be most densely ignorant of what it is all about. Who, then, in the usual case will have the privilege of directing him how to vote? Why, of course, the same organization that directs the voter regularly how to cast his ballot for candidates for office. The power of the extra-legal government to advise and direct the politically ignorant voter how to vote will be just as effective in the normal election to carry or defeat an act on an initiative or

referendum as it is to place men loyal to it in the offices of the legal government.

The initiative and the referendum, then, while they may at times give the righteous a desirable advantage, will in normal conditions place in the hands of the extra-legal government the opportunity to secure the passage of undesirable laws or to defeat good ones and to insist for a time at least that this is "the judgment of the people"; just as for years they have declared that when the system of frequent elections for many offices produced undesirable officeholders, it was the result of the will of the people.

## CHAPTER IX

### THE RECALL

What has been said of the initiative and the referendum is almost precisely applicable to the recall.

The movement for the recall began just as soon as it was generally perceived that our system of frequent elections to fill a large number of offices did not prevent the extra-legal government from placing in office men loyal to it. The movement for the recall is the frankest admission that this system of elections has been a failure. The real cause for this failure was the fact that too much voting had overloaded the voter and his resulting political ignorance had delivered him into the hands of an organization which in effect cast his ballot for him. Again, however, this was entirely neglected, and the superficial and obvious remedy was put forward of having a new election whenever it was discovered that an officeholder was objectionable because of his

subservience to an extra-legal government. The statutes, however, do not undertake to submit to the electorate the question whether the officers subject to the recall elections have been too subservient to the extra-legal government and that alone. Instead, the voters may cast their votes for the recall of an officer on any ground they please.

If there is an organized and effectively led revolt against extra-legal government, then obviously the weapon of the recall may be of great service. It will enable the attacking party to sweep out of office adherents of the extra-legal government who would otherwise have held until the next election, when the tide of popular sentiment in favor of the attack might have begun to ebb. But revolts are not at all frequent. There has always been an opportunity at regular elections for such movements through independent nominations by petition. A revolt of any consequence would have undertaken to use this method. In spite, however, of the opportunity thus afforded, the general revolt against extra-legal government in

local districts is the occurrence of a decade, if not of a generation.

It is the effect of the recall under normal circumstances, when no revolt against extra-legal government is in progress, that must principally concern us. At such times the recall is more valuable to the extra-legal government than it is to the electorate at large. The recall is as available to the extra-legal government as it is to the electorate at large. In fact, the extra-legal government must of necessity become familiar with its use. Every officer of the dummy legal government must, therefore, at all times act with the knowledge that the extra-legal government may start a recall election against him. Imagine what this means to the host of subordinate officers that were put in apparently by the electorate, but of whom the electorate never had any knowledge whatever. They have no popular following. They have no money with which to advise and instruct the voters of the character of the fight that is being made against them. What possible chance would such officeholders stand against the per-

manent organization of advisers and directors to the ignorant voter which the extra-legal government controls? The recall under normal, everyday conditions would place the majority of officeholders even more completely in the control of the extra-legal government than they are now.

The recall, if applied to the judiciary, would in usual and normal times operate to give the extra-legal government the same power over the judges that it would have over other officeholders.[1] A judge is one of the most helpless of all elective officers. He can run on no platform; he can have no political program. He cannot point dramatically to any achievements on behalf of the people. Whether he is a good judge or not is a matter of expert opinion that only a comparatively few persons are competent to pass upon. His reputation can be easily blasted by the circulation of false statements. He may even be hurt by the performance of his duty in a particular case. His retention in office at elections is in a great number of instances purely a

[1] See *post*, chap. xvii.

matter of accident. If he is up at a fall presidential election, his retention in office will practically depend upon the success of the national party in whose column his name happens to be. It will make little difference whether he has been one of the best judges that the county or state has ever had, or one of the worst. Elections place the judge very largely at the mercy of the extra-legal government. That government may not be able to return him to office, but the judge knows that without its support his re-election will become practically impossible. To give the extra-legal government the opportunity to use the recall upon a judge is to hold above the judge's head at all times the threat of an extra election which he is in no wise prepared to undergo. Nothing could more clearly increase the power of the extra-legal government over the judiciary. If the recall of judges be advocated on the ground that they have become subservient to the politocrats, the conditions which have caused them to become so will have been greatly increased by

the very device which is advocated as a means of ridding us of that subserviency.

We may conclude, therefore, that there is no more danger to extra-legal government in the recall than there is in frequent elections and independent nominations by petition. On the other hand, the free use, or freely threatened use, of the recall by the extra-legal government will give it a power over officeholders and judges greater than that which it now has.

## CHAPTER X

### INDEPENDENT MOVEMENTS AND THE NEW PARTY

Independent movements have been launched in different localities from time to time. These have been prompted by the too open and too violently selfish use of power by the extra-legal government. They have often been temporarily successful. But they have been available only upon extraordinary occasions and have proved of merely temporary effect. In the first place they did not develop any organization of professional advisers and directors to the politically ignorant voter. They did not continuously put forth the effort to establish a centralized extra-legal government which the condition of decentralized legal government demanded. Secondly, the independent movement suffered under the disadvantage of operating in opposition to the candidates of the two great historical parties—the Democratic and the Republican. This was an almost

insuperable obstacle when the local state and national elections were held together.

One of the important independent movements of the last fifty years is that which brought into existence the Progressive party. The spark which touched this off was what appeared to a large number of voters to be the refusal of those who legally controlled the Republican National Convention to make a nomination for president of the United States in accordance with the express wishes of a majority of the rank and file of the party. It was in effect an exhibition of the arbitrary action of the minority in refusing to carry out the expressed will of the majority. Those legally in control of the convention were supported principally by the delegates who had been sent as the result of the action of local political organizations in the states where no primaries had been held. Those who did not legally control the convention were supported by the delegates who were directed by the majority of the party electorate actually voting in the primaries, to nominate Mr. Roosevelt.

In short, a great independent revolt had been started in the Republican party at the primaries. In the convention the popular will was directly matched against the forces, similar in appearance, if not in fact the same, to those of the usual extra-legal government. Naturally the efforts of the new party have been expressly dedicated to the disrupting of extra-legal government in this country. For the first time a national party has begun to proclaim the fact that extra-legal government does exist; that it can maintain and exercise its power against the will of a majority, and that it must be destroyed.

These utterances are of enormous value, but when we look at the platform of the new party for the ways and means of accomplishing the result the outlook is not encouraging. We find the new party approving of the primaries, the initiative, the referendum, and the recall of officers other than judges. These proposals, as we have already analyzed them, hold out no promise of permanently disrupting extra-legal government. It is true the short ballot is advocated, but as yet there seems to be no clear

perception of the connection between the long ballot, the decentralization of governmental power, the political ignorance of the voter even when he is an intelligent man, and the rise and permanent acquisition of governmental power by the extra-legal government. The short ballot seems to be included in the Progressive party's platform, not because it embodies a theory of government which is entirely opposed to that upon which our state governments were founded and have been developed, but because it is one of several panaceas and because of its superficial and obvious appeal. The Progressive party does not reveal itself as yet ready to assume a theory of government which lies at the basis of the short ballot and which insists upon the centralization of governmental power exercised in subordination to the popular will, as distinguished from the decentralization of governmental power exercised in subordination to the influence of an extra-legal government not readily answerable to the popular will.

If our state governments remain as they are with only such alterations as come from a

shorter ballot, the primary, the initiative, the referendum, and the recall, extra-legal government will not be eliminated. The Progressive party must then either cease to exist, as so many other lesser independent movements have done, or it must acquire an organization precisely such as the old parties have had. It must acquire the same multitude of legal vote-directing machines, the same feudal hierarchy of politocrats, and by this means establish an extra-legal centralized government to run the decentralized legal government. Whichever happens, the new party, as the champion of the power of the electorate against the power of the politocrats, will have failed. The new party is indeed doomed to failure unless it can so change our theory of government and induce the making of new governmental arrangements pursuant to that theory, that extra-legal government on its present grand scale will no longer be possible.

## CHAPTER XI

### THE SECURITY OF EXTRA-LEGAL UNPOPULAR GOVERNMENT BY POLITOCRATS IN THE UNITED STATES

Extra-legal unpopular government rests fundamentally upon the fact that a few are able to cast the ballots of the voters for them. This is accomplished through the process of advising and directing the voter how to vote. The opportunity to do this at all is presented whenever the voter is politically ignorant and still insists upon voting with an apparent show of intelligence. The opportunity to advise and direct the voter how to vote is presented on a large scale when the entire electorate, no matter what its average intelligence may be, is made politically ignorant concerning a majority of the candidates for office. The decentralization of governmental power, as manifested in the multiplication of elective offices and the frequency of elections, has placed upon the voter —even when he is a most intelligent man—

a burden which he does not and practically cannot carry. He therefore goes to the polls politically ignorant and the essential condition is presented upon which the rise and establishment of an extra-legal unpopular government rests. It may be observed, therefore, of all efforts to disrupt and destroy a system of extra-legal unpopular government, that so long as the assault upon it consists of a more frequent appeal to the electorate on occasions of ever-lessening importance, the more the assault will in reality contribute to the condition which makes the existence of some extra-legal government unassailable.

The growth and security of extra-legal unpopular government rests upon the increase of the political burdens upon the voter. Every political theory, every governmental bogey, and every practical innovation which tends toward the multiplication of elective offices, the frequency of elections and the consequent decentralization of the power of government, whether state or local, must be advocated and encouraged by the politocrat. Every effort must be

made by him to foster and maintain the popular conviction that the centralization and concentration of governmental power in the hands of a few, even though those few hold office as a whole at the mere whim and pleasure of a majority of the electorate, is the real basis of unpopular government and inimical to free institutions. He must make every effort to foster and maintain the popular conviction that the only hope of popular government and free institutions lies in as many appeals to the electorate on as many occasions as possible. This idea may be conveyed in convincing and epigrammatical form by repeating the wisdom that the cure for the ills of democracy is more democracy. The electorate should never be allowed to forget that by reason of the constant appeals to them they are ruling, and that whatever happens they are responsible.

In short, the security of unpopular government lies in the maintaining of the popular conviction that our present constitution and laws are sound. The bulwark of unpopular government in the United States today is the

man who believes that our institutions are fundamentally satisfactory; that in the main our scheme of government is the best that was ever devised or can be devised; that it is the fault of the electorate that bad men are in office; that the electorate at the last election put the machine out of business, or came near it, and is going to do better the next time; that if the machine is not disrupted, then the people themselves are at fault and richly deserve what they get; that if any improvements are needed they will be found in the more frequent appeals to the electorate through such devices as the primaries, the initiative, the referendum, and the recall. Extra-legal unpopular government must encourage men of this stamp and teach these fundamental principles to its supporters. While such men represent the views of the masses extra-legal unpopular government will be safe.

Unpopular government in the United States will be secure until our present popular convictions about the science of government are reversed and popular and persistent opinions

prevail that the ability of the electorate to vote intelligently is limited; that the moment the voter is called upon to fill any other than a few offices which wield great power and are therefore conspicuous and important, he becomes politically ignorant, even though he be an unusually intelligent man; that it makes no difference that this may be his fault, for the fact remains and will remain; that it is this artificially stimulated political ignorance of the voter that delivers his vote to a permanent organization maintained for the purpose of directing him how to vote; that to prevent this artificially stimulated political ignorance on the part of the voter he must be called upon to exercise such a limited voting power as he is able to use with intelligence. This means that the power of government must be centralized and concentrated in the hands of a few officeholders of the legal government who are prevented from perpetuating their power and so establishing an unpopular government by being at all times subject to be ousted or kept in office at the pleasure of the majority of the electorate. The

moment the real government, be it legal or extra-legal, can be swept out of office as a whole at a popular election easily initiated, which makes the existence and action of the real government a direct issue, the most effective means yet devised for preventing a real government from becoming unpopular—i.e., maintaining the selfish exercise of power in the face of popular disapproval—has been found. When these principles of government are received by the masses with the same conviction that they now support the theory of government that a minimum amount of power should reside in any one officer or department of the legal government and that appeals to the electorate should be upon as many matters and as often as possible, the downfall of extra-legal unpopular government will be imminent.

## CHAPTER XII

### THE MENACE TO UNPOPULAR GOVERNMENT OF THE COMMISSION FORM OF GOVERNMENT FOR SMALLER CITIES

It took a flood and a hurricane which overwhelmed a prosperous city to reverse the popular convictions which lie at the basis of government in the United States. In 1900 Galveston was all but destroyed by the waters of the Gulf rising during a hurricane. Confronted with a great emergency in which quick and efficient action was imperative if the city was to be restored at all, the people abandoned the fear of kings and of centralized governmental power. The entire municipal power of government, executive and legislative, was vested in a single board of five commissioners. These were both the legislature and the executive. They made the ordinances and wielded the executive power through subordinate officers appointed by them. The governmental principle which was thus applied in the

commission plan is the concentration of governmental power by the union of the legislative and executive functions of government in the hands of a few[1] who are controlled and prevented from becoming an unpopular government because they are subject to the electorate through elections at frequent intervals. The office of commissioner was made conspicuous and elections interesting. The population of Galveston was about 40,000. Hence the entire city was not so large but that a candidate might be personally known with a fair degree of ease by the electorate, and with the least possible expense make a personal canvass. It was, in short, a wieldy

[1] The question is frequently put whether it is better to have five commissioners and let them choose their own chairman as a mere presiding officer, or to provide that one commissioner specially elected shall be chairman, with special executive and administrative powers. The two plans represent simply a difference in the degree with which the executive and legislative powers are united. If one commissioner is elected specially as a chairman or a mayor, with administrative and executive duties, and the other commissioners are merely an advisory board, you have a certain degree of separation of the executive and legislative functions. The chairman or mayor must in that case be elected at large from the city. His office will be so conspicuous and important as to overshadow the offices of the commissioners, and there will be the probability of deadlocks between the executive and the commissioners exercising the legislative power. If, on the other hand, all the

district. Hence the coming forward of candidates was increased to the maximum, and the need for a vote-directing machine practically eliminated. The maximum amount of thought and intelligence was obtained from the voter because his attention was concentrated on filling a few important offices. Excessive and artificial political ignorance was thus diminished. The ultimate result was a real expression of the will of the electorate through the representatives chosen and full power in those representatives to enact that will into law and also enforce the law thus made. In actual operation the results of applying this principle left

commissioners are equally possessed of the executive and legislative power, there is a complete union of both functions. The majority of the commission then becomes entirely responsible, not only for the making, but for the enforcement, of the laws and administrative measures. So far as the disrupting of extra-legal government in cities the size of Galveston is concerned, it is believed not to make any material difference which plan be adopted. The surer course is that of making the majority of all the commissioners responsible for the exercise of the entire legislative and executive powers.

It is entirely in accordance with the principle of the union of executive and legislative powers in the commission that it hire a professional municipal administrator to hold office at the pleasure of the commission and delegate to him such executive duties and legislative power, subject always to the control of the commission, as the commission sees fit.

little to be desired in Galveston. Here are the comments of a keen observer,[1] writing in 1911:

To Americans accustomed to inefficiency in public office as contrasted with private enterprise, the story of the achievements of this Commission reads like a romance. Unhampered by checks and balances and legal red-tape, the Commission reorganized the city government, restored the city property, planned and financed and built the great sea-wall that now bars out the sea, raised the ground level of the city, and, withal, reduced the tax-rate and the debt! The annual running expenses of the city were decreased one-third. The new government displayed foresight, intelligence, and dispatch. It appeared sensitive to that public clamor which the average politician considers so needless.

There was striking change in the attitude of the public toward the doings at City Hall. The people began to "take an interest" in their common property, to discuss the doings of the Commission on street corners, to have "civic pride" (since there was now at last something to be proud of), to criticize or applaud the work of their servants. They seemed to have actually a proprietory interest in the government! Amid this widespread discussion the influence of the

[1] Richard S. Childs, *Short-Ballot Principles*, pp. 66–67.

politicians of the town was swamped and counted for only its true numerical strength.

Now every American city has its spells of good government—the reactions that follow orgies of corruption and scandal—and the fact that the new Galveston government saved money is not in itself significant. The vital difference is that these good administrators in Galveston, without building up personal "machines" or intrenching themselves in power by the usual army-like methods of political organization, were able to secure re-election again and again. They won favor by serving all the people well. They did their work in the spot-light of public scrutiny, where every citizen could see and appreciate and applaud.

Unless, however, the fundamental principles at the basis of government by commission are observed and applied, there can be much apparent commission form of government for cities which will not in any way militate against extra-legal unpopular government.

If, for instance, a municipal government by commission is planted in a territory where several other municipal governments are also operating, each with a long list of elective officers, very little has been accomplished

toward that centralization of governmental power in a few commissioners which tends to eliminate extra-legal government. Each of the municipal governments operating in the same territory will divide the entire local governmental power among them. The decentralization of governmental power will still exist in exaggerated form and the political ignorance of the voter must still be such that he will need to be advised and directed how to vote, and the professional adviser and director to the politically ignorant voter will still continue to satisfy that need. Once the professional adviser and director to the politically ignorant voter is retained in the district where the commission form of government operates, he will begin to exercise an influence in the nomination and selection of the commissioners. Extra-legal government as conducted by him may even capture a majority of the commissioners and use the great governmental power vested in them in a scandalous manner. The present situation in Chicago well illustrates this danger. There the municipal government is very highly central-

ized. The voter casts his ballot only for a mayor every four years, a city clerk and the city treasurer every two years and two aldermen from each of the 35 wards—one alderman being selected from each ward every year. The other administrative officers not under civil service are appointed by the mayor with the consent of the council. If Chicago were the only local government in the territory which it occupies it would be a fair type of responsible city government wielding a highly centralized governmental power. Machine politics would thrive only in the districts where the majority of the voters were illiterate and where corrupt and illegal voting was practiced on a considerable scale. But operating in the same territory with the city of Chicago is the Sanitary District with 9 trustees, and Cook County with 73 elective officers. It is the long ballot for Cook County which causes the densest political ignorance on the part of the voter and makes the existence of the professional adviser and director of the politically ignorant voter necessary and therefore the existence

of extra-legal government certain and permanent. Such an extra-legal government, when once established, naturally exerts a great influence even in city elections. If the two principal party vote-directing machines agree to divide the city and county governments between them and each helps the other to appoint those who are to fill the legal offices in that government which it is agreed each shall control, the power of extra-legal government in the city will be very great indeed. In the same way, if a commission form of government be provided for smaller cities which must divide governmental power with a township government, a county government, and a drainage or a levee district, all operating in the same territory and all having a considerable list of elective officers, there is little hope for a real trial of the effect of the concentration of governmental power in a few elective offices to disrupt extra-legal government. It is of the utmost importance to the success of the commission form of government for smaller cities that such government be the

only local government operating in the territory occupied by the city.

In some cases, however, it is necessary that municipal corporations with special powers and functions and collecting taxes from a special district for a special purpose should occupy territory in which several other units of municipal government operate. For instance, the Sanitary District in Cook County properly levies taxes upon property in the city of Chicago and in part of Cook County, and builds a canal running through Cook County and Will County. How is it possible to avoid having the commissioners of such a sanitary district elected from the district where its revenues are obtained? The answer is very simple. Such commissioners should be appointed by the different municipal units of government occupying the territory included in the sanitary district. The city of Chicago, of course, should appoint the majority of the commissioners. The municipal governments outside the city of Chicago should be combined together in groups and the legislative bodies of the municipalities in each

group be given a voice in the selection of commissioners for the Sanitary District. The same principle of appointment may be adopted whenever a special board with special functions is to occupy territory which includes several units of local government.

The effectiveness of the commission form of government for cities to oust extra-legal government requires the election of each commissioner from a wieldy district, i.e., one not so large but that the candidate who is willing to run may be known with a fair degree of ease by the electorate and be able with the least expense to make a personal canvass.[1] The supposed advantage of electing commissioners at large from an unwieldy district is that this method insures the candidacy and election of men prominent in the entire district and hence more fit to hold office. But this is precisely what it does not do. It is true such a plan *demands* candidates with a wide general reputation in the whole district. But such candidates do not come forward

[1] For a further exposition of a wieldy district see Richard S. Childs, *Short-Ballot Principles*, pp. 51–58.

simply because the method of election suggests that such candidates should appear. Men with wide reputations in a large district are almost certain to be occupying offices of greater importance in the state and federal governments, or else they are not available at all for the holding of public office. The leading citizen will not as a rule be a candidate for a position in the municipal government. The available candidates are almost sure in the long run to be men whose reputations are confined to some district of the larger community. When they run for election in a district which stretches beyond the zone of their personal influence and reputation, some machinery for enlightening the voters' ignorance as to who they are and what they stand for must be devised. This means that the candidate must have money and backing. Those requirements may seriously limit the number of candidates and therefore the choice of the voter. Furthermore, in promoting slates of candidates care will usually be taken to select men with reference to particular districts in the community at large, so that each

district will feel that it has a representative on the ticket. Thus a provision for the election of commissioners at large from an unwieldy district is likely to relapse in practice into the presentation of candidates representing small districts, each with a local reputation in his own district. This becomes in substance an election of commissioners from districts and yet the range of choice by the voter resulting from the coming forward of candidates will be very much restricted because of the expense of making a canvass in the unwieldy district and the necessity for an organized support. Candidates who are successful in being elected from the unwieldy district are likely to be beholden to an organization, whether it be temporary or permanent, which has aided them in the election. A system of electing commissioners at large from an unwieldy district in a greater or less degree produces a condition which tends to keep alive the extra-legal government. On the other hand, with elections in wieldy districts the number of candidates who come forward is the largest possible. The choice of the voter

is, therefore, the widest. Each candidate may become most easily personally known to the electorate. The sharp contest between individuals in a small district is always peculiarly enlightening to the electorate and stimulating to his interest in political matters. The expense of a canvass may, therefore, be reduced without lessening the amount of knowledge which the voter will obtain regarding issues and candidates. The services of an extensive organization for the purpose of directing the politically ignorant voter who to vote for would naturally give way to organizations for dispensing actual knowledge concerning candidates and conditions. The services of a highly developed and permanent machine designed to direct the politically ignorant how to vote must become of the least possible value.

The practice of the principle of selecting commissioners from wieldy districts may take several forms, depending largely upon the size of the electorate.

If the whole city is not more than a wieldy district in itself, then of course the election of

all the commissioners at large is in accordance with the sound principle announced. Such election may very properly be according to any one of several plans.

*First:* The candidates to the number of commissioners to be selected receiving the highest vote at a single election may be declared elected, although none receive an actual majority of the votes cast. This is the simplest method. It is the one in use at Galveston, with a population of about 40,000, and seems to have given satisfaction.

*Second:* The commissioners elected at large may be required to receive an actual majority. If there are more than two candidates for each place, this may be secured at a single election by the voters marking their first and other choices for each of the places to be filled, so that if no election is had by a majority according to the first choice of the voters, the second and other choices may be used to indicate which ones receive an actual majority. Or a second election may be held at which only candidates in double the number of places to be filled who

have received the highest number of votes at the first election are placed upon the final ballot. The second election may be required even though candidates receiving the highest votes at the first election actually receive a majority. This last is the plan adopted, apparently with good results, in Des Moines, Iowa.[1]

*Third:* Then there is the Hare plan of proportional representation and the single transferable vote.[2] To insure an election a candidate need only obtain a "quota" of the votes cast —i.e., that number of votes which can be obtained by the number of candidates equal to the number of places to be filled, but by no more. Thus if the electorate number 5,000 and there are 5 places to be filled, the "quota" or number of votes required for an election would be 834. Five persons could receive this number of votes, but the sixth candidate could not do so.

[1] John J. Hamilton, *Dethronement of the City Boss*, pp. 158–168.

[2] See *Encyclopedia Brittanica*, 11th ed., XXIII, 115 (from which the description in the text is largely taken); Richard S. Childs, *Short-Ballot Principles*, p. 58; Ramsay Muir, *Peers and Bureaucrats*, pp. 236–39; C. G. Hoag, "The Representative Council Plan of City Government," *The American City*, April, 1913.

Each voter is allowed to indicate his first, second, third, and other choices, but can indicate only one first choice and one second choice, etc. At the first count only first choices are reckoned and the candidates who have received a "quota" or more according to first choices are declared elected. If all the places have not then been filled up, the surplus votes of those candidates who have received more than the "quota" are transferred according to the names marked (2) on them. If these transfers do not bring the requisite number of candidates up to the "quota," the lowest candidate is eliminated and his votes transferred according to the next preference, and so on until all the places are filled. The object of this plan is to give representation to minorities or to groups less than a majority.

So far as the disruption of extra-legal government by politocrats is concerned, it is doubtful if it makes any difference which of the above plans of election be adopted in commission-governed municipalities which as a whole constitute only a single wieldy district of, let us

say, not to exceed 6,000 male voters and 50,000 inhabitants.

Suppose now the municipality be larger than a single wieldy district, but still small enough so that it is very plainly a unit in its interests and collective activities—let us say a city with not to exceed 25,000 male voters and a population of not more than 150,000. Here there will be a distinct danger in electing commissioners at large at a single election at which are chosen those who obtain the highest votes, even though less than a majority. If the choice is to be by a plurality at a single election the municipality should be divided into wards with a single commissioner elected from each, but no candidate should be required to reside in the ward where he stands for election. The Hare plan is entirely available and consistent with the choice of commissioners from wieldy districts. In Des Moines, Iowa, with a population of about 86,000, the double election plan seems to have been used with success. This may also be regarded as consistent in a way with the election of commissioners from wieldy districts. True,

a single district with a population of 80,000 might be regarded as unwieldy for the purpose of a single election. But the double election secures the same education for the electorate that the voter would obtain in a single election in a district one-half as large. Hence a wieldy district having a double election can be considerably larger than a wieldy district having a single election.

Suppose, however, that the municipality be large enough to be readily divided into as many wieldy districts as there are commissioners to the number of from five to nine. For instance, let us assume a city of to exceed 25,000 male voters and a population exceeding 150,000. Here the district is too unwieldy for the election at large of those candidates receiving the highest votes at a single election. It may be doubted whether the double election will produce satisfactory results in the way of securing a really intelligent vote. We have probably come to a situation where the principle of electing commissioners from wieldy districts requires either a division of the city into wards

with a commissioner elected from each, or else the election at large of all the commissioners by the Hare plan, in which only a "quota" of votes is required for a choice. The advantage which the Hare plan has of permitting the candidates for commissioner to come from any part of the city can be duplicated to some extent in the ward plan by not requiring any residence by candidates in the ward of the city where they stand for election. Under either arrangement candidates will in all probability come from particular districts and localities where their strength lies.

It is no part of the writer's plan to discuss at length the comparative merits of the system of election from wieldy geographical districts and wieldy "quotas." Each has its advantages and disadvantages. The wieldy geographical district has the advantage of presenting an issue of extreme simplicity to the voter and inducing interest in it by the dramatic element of personal contest. The field in which the candidates contest being limited, there is more concentrated work upon the education of the

electorate and the electorate focuses its attention. It is not so clearly the fact that in a municipal election a large minority may be wholly unrepresented as it might be in elections to a national legislative body. The Hare plan insures minority representation, or rather representation of different groups throughout the district. It, however, departs from a desirable simplicity in voting and vote-counting. It tends to eliminate the sharpness of personal contest between candidates. Under the Hare plan candidates will go on a still hunt all over the district for a "quota" and bid to various classes and cliques in the municipality for first and second choices. This develops what is called "minority thinking" and "particularist politics." The candidates do not run against each other so much as they dodge in and out about each other. This also tends to puzzle the voter, confuse the issues, and achieve results which are unexpected. The test of the Hare plan in cities of over 150,000 inhabitants in the United States is, it is believed, still to be made.

If the principles of the commission form of government be applied faithfully and completely, there is no doubt that extra-legal government in its present violent form must go. The voter's duty will be simple and he can perform it with the maximum amount of intelligence. The function of the electorate in voting is vital because it confers the whole power of the local government upon a body which is directly responsible to the electorate. What place, then, is there for the professional adviser and director to the politically ignorant voter? None! There is no such political ignorance as calls for a director and adviser. The voter needs only enlightenment as to which of two honest and fairly efficient men has a program which the voter on the whole favors. The voter is seeking information of a highly organized sort. He can obtain that only by the use of his mind and a consideration of the promises and programs of the candidates. The candidates now must make an appeal to the voter's intelligence. What, then, is the need of the present-day extra-legal government?

Of course, parties and party organizations will spring up, but they will cease to be mere machines for directing the ignorant voter how to cast his ballot. Instead, they will become instruments for disseminating propaganda on social, economic, and governmental issues.

Once the extra-legal government is eliminated by the concentration of governmental power in the hands of a few, each of whom is elected to office from a wieldy district or by a wieldy "quota," the electorate may with perfect safety secure control of its representatives in a variety of ways. It may insist upon the recall, the initiative, and the referendum. It is the promotion of these expedients while the ballot is still left as long as at present and the governmental power decentralized as it now is that tends to promote the existence and security of extra-legal unpopular government. With irresponsible extra-legal government replaced by a responsible legal government subject to frequent elections, one might hazard the guess that neither the recall, the initiative, nor the referendum would be much used. The prima-

ries would be utterly out of place. No party names would appear on any ballot. In theory every individual legally qualified for office would have the privilege of running at an election. Individuals should be allowed to put themselves up. To discourage the running of irresponsible persons who have no real chance of election a sum should be forfeited by all candidates who do not receive a certain percentage of the vote cast. Parties with principles and programs would naturally be the only ones which would have any standing. It is highly improbable that any such parties would exist for municipal elections. If they did, they should be left free to run their affairs in their own way, since their candidates must always compete with individuals who wish to come forward in opposition.

## CHAPTER XIII

### THE PRINCIPLE OF THE COMMISSION FORM OF GOVERNMENT APPLIED TO THE LARGER CITIES

If the city be a larger one, with 100,000 male voters and upward, and a population of 700,000 to 1,000,000 and upward, its government by a small commission, each member of which is elected from a wieldy district, or by a wieldy "quota" under the Hare plan, becomes impossible. When districts begin to have more than 6,000 male voters and a population of more than 50,000, or the "quotas" are over 6,000 male voters, they are probably no longer wieldy. Yet a commission of 16 and upward is no longer a body which can exercise legislative and executive power in a convenient manner, like a board of 5, or even 9. The problem of the application of the principles of the commission form of government to the larger cities is therefore this: How can districts or "quotas" be kept wieldy and the city at the same time be governed by a

small commission having both legislative and executive powers?

One solution of the problem is as follows: The control of the entire executive and legislative power of the municipality should be vested in the municipal council. This should be composed of as many members as there are wieldy districts or wieldy "quotas" in the municipality. Taking 3,000 voters as making up a wieldy district or "quota," this would give a city of 100,000 male voters a council of 33 and a city of 300,000 male voters a council of 100. This last might be reduced to 50 if the maximum of 6,000 male voters be taken as the measure of a wieldy district or "quota." This council should then appoint the mayor and perhaps, with the mayor's approval, the heads of the departments, all to hold office at the pleasure of the council.[1] The mayor and his heads of departments should then form a governing commission or board with such executive and legislative powers as might be conferred by ordinances

[1] See Richard S. Childs, "The Theory of the New Controlled-Executive Plan," *National Municipal Review*, II, 76 (January, 1913); C. G. Hoag, "The Representative Plan of Government," *The American City*, April, 1913.

passed by the council and subject at all times to the control of the council. Such a scheme would retain the system of electing representatives from wieldy districts. There would rest upon them full responsibility for the exercise of the legislative and executive power. Yet they would be left free to delegate executive power and some legislative power to a commission of administrators whose whole business it was to serve the municipal government. Such a commission might be composed of the leaders of the majority of the council or of expert municipal managers brought from any part of the world, or both. The council should be left free to choose what method it would adopt.

A plan of government for our larger cities frequently adopted is this: Single aldermen are elected from each wieldy district in the municipality. All the aldermen thus selected form a city council which exercises the legislative power. The mayor is elected at large. He presides over the city council and, with the heads of his executive departments who hold at his pleasure, wields the entire executive power.

The new Cleveland charter gives the department heads seats in the council with the right to address that body. There is here a proximity of the executive and legislative power, rather than a real union of it. Whatever union there may be is largely on the side of giving the executive a position in the deliberations of the legislative body. The council has no function in the actual exercise of the executive power. The entire executive power is really concentrated in a single individual elected at large and holding office for two and often four years. This feature is in sharp contrast to the vesting of the executive power in the representatives of wieldy districts or "quotas," who control and direct the exercise of that power by a single executive who holds at their pleasure.

The one plan that should not be attempted in our larger cities is that of providing for the union of the executive and legislative functions in a few commissioners elected at large, thereby violating the essential principle of electing representatives from wieldy geographical districts or by wieldy "quotas."

## CHAPTER XIV

### THE PRINCIPLES OF THE COMMISSION FORM OF GOVERNMENT APPLIED TO THE STATE

The principles at the basis of the commission form of government for cities may equally well be applied to a state government.

Our first care must be to eliminate the division of power which comes from having two legislative chambers, each equally representing the electorate. The legislative power as it comes from the electorate at large must be lodged in a single legislative chamber.

In the second place we must provide for the election of members to this single chamber from "quotas" or districts which are as wieldy as possible. One member should be elected by each "quota" or from each district.[1] The

[1] The Illinois plan of minority representation in the legislature provides for the election of three representatives from each district and allows each voter to cast three votes as he pleases, one for each candidate or three for one candidate or one and a half for each of two candidates. Where extra-legal government by politocrats is strong, this has for years resulted in members of the

requirement that districts or "quotas" which elect members be wieldy is so important that it must determine the minimum number of members in the single legislative chamber. If it be determined that a district or "quota" with 4,000 male voters would be suitably wieldy, then each district would contain a population of about 25,000, and for a state like Illinois there would be 200 districts.

Lastly, following the commission form of government for cities we must place the control of the entire executive power in the hands of this single legislative chamber. In short, we

legislature being appointed by the extra-legal government. The electorate has been wholly and palpably disfranchised. If there are two political machines in the district, one dominant and the other with a fair strength, they have by agreement between them arranged that the dominant machine should nominate only two candidates and the other only one. Thus the voter is given no choice whatever and the nominations are an appointment. If there are three equally strong political machines, each by agreement will nominate one candidate. As a matter of fact without agreement the number of candidates nominated will usually be as above indicated under the circumstances named. Thus the electorate in very many Illinois districts has had comparatively little or no real representation in the lower house of the legislature for years. The worst elements in the house have under this system been returned again and again. See editorial in the *Chicago Tribune* for December 22, 1912, on "Minority Representation."

must apply the principle of uniting the executive and the legislative power in the same body. How, it will be asked, can this be done? It is essential that the legislature should have two hundred members so that the districts or "quotas" may be wieldy. How, then, is it possible to give to the legislature control of the executive power?

It is believed that the plan of a state executive selected by the single-chamber legislature and holding at its pleasure, after the manner of the controlled executive for the larger cities, will not do. It is true the state executive may not handle so large a budget as some cities, but the state executive power is not for that reason less important or extensive. The legislative power of the state, which is greater than the legislative power of any city, may build up the state executive functions so that they are quite beyond those of any city. The state executive functions are, therefore, always potentially more extensive than those of the city executive. Then in the state legislature composed of one hundred members or more representing differ-

ent political and party programs, there are far greater chances of a serious deadlock than in a city council. When a deadlock occurs in the state legislature it may be difficult, if not impossible, to determine what are the controlling elements in the legislative assembly if the power of selection is left with the legislature itself. There is need, therefore, of an independent authority outside the legislature to select from it those who shall wield the executive power and thus rescue the exercise of that power from any deadlock among the legislators.

These considerations lead naturally to the following plan: All executive acts must be done as now, in the name of a single executive. But the control of all executive acts must be placed in the hands of a council of state, to be composed of (let us say) seven members, who should usually be drawn from the leaders of the regularly voting majority of the legislative chamber. It will be the important duty of the single executive to determine who are the regularly voting majority, and who are its leaders,

to summon them to form a council of state, to determine when those leaders have ceased to possess a regularly voting majority and, when that occurs, to dismiss them or accept their resignations and replace them with a council of state which has at its command a regularly voting majority. Once the council of state is selected, however, the actual control of the executive function will reside in it. Thus the real executive is the council of state, and since it must usually control a majority of the legislature, it will have possession of the legislative power as well. This is the neat and feasible scheme for applying the essential principle of the commission form of government when a large representative assembly is a necessity. The method of selecting the single executive whose principal duty it is to place the executive power of the state from time to time in the control of a proper council of state, selected from among the leaders of a majority of the legislature, is not very important. Very likely the only practicable way would be by election at large at considerable intervals of time.

Very little alteration in our present state constitutions is necessary in order to bring about the greater part of the change in the plan of government suggested. The members of the lower house of the legislature are usually elected from fairly wieldy districts. The union of the executive and legislative functions is very simply accomplished by dropping from the list of elective officers the lieutenant-governor, the secretary of state, the auditor of public accounts, the treasurer, the superintendent of public instruction, the attorney-general, and others and adding the following provisions:

There shall be an executive council to advise the governor in the government of the state. The members thereof shall be chosen and summoned by the governor and serve as executive councilors. They shall hold office during the pleasure of the governor.

The executive power vested in the governor by this constitution shall, unless in this constitution otherwise specified, be exercised by the governor acting with the advice of the executive council. The provisions of this constitution, referring to the governor in council, shall be construed as referring to the governor acting with the advice of the executive council.

The governor may appoint officers not exceeding ten in number to administer such departments of the state as the governor in council may establish and until such establishment, to administer the departments of state, public accounts, treasury, public instruction, justice, and state institutions. Such officers shall hold office during the pleasure of the governor. They shall be the members of the executive council and after the first general election of members of the general assembly, as herein provided, *no member of the executive council shall hold office for a longer period than three months unless he is or becomes a member of either house*[1] *of the general assembly.*

The necessary result of such changes would be that the governor could do no important act without the consent of the council. The council would in fact be the executive. The election which put the governor in office might be expected to put a majority of the same party in the legislature, and the executive council would naturally be selected from the leaders of that majority. Even if the governor and the majority of the legislature belonged to different parties, yet there would be the strongest motive

[1] This assumes the existence of a second chamber as suggested in chap. xvi.

for the selection of an executive council from the majority of the legislature, thus avoiding the responsibility for a contest between the majority in the legislature and the executive which would throw the government into confusion.

The complete success of a plan which involves the union of the executive and legislative power in the leaders of a majority of the legislature requires the presence in the legislature of some at least of the leaders of the principal parties. The absence from the legislature of such leaders would leave the control of the most important powers of government in the hands of the less experienced and less able members of the party. The opposition also might have a less effective representation. This would be a serious matter for the parties themselves. The public service also would suffer. It is in the interest of the best administration of the affairs of state that the ability and experience of the party leaders of both the majority and the minority be kept in the service of the state as long as possible. It is also important that the executive and legislative powers be exercised for the benefit of

the state as a whole and not for the purpose of furthering the parochial interests of individual legislators. This is most surely accomplished by the presence in the legislature of the party leaders of the majority. There are several ways of insuring the return to the legislature of some at least of the leaders of the principal parties, even when they may not be able to secure a plurality of the votes cast in the district where they run: First, candidates for the legislature may be permitted to stand for election in any district of the state, no matter where they reside. That does not go far, however, in the direction of returning party leaders unless elections are held at different times in different districts. Second, if elections are held at the same time in all districts the elector might be permitted to vote for a candidate running in his own or any other district. This would enable the party to switch some of its votes in a district where it was strong to special leaders standing for election in districts where their success was in doubt. This is one of the proposals of the People's

Power League of Oregon. Third, a direct way of accomplishing the desired result would be to permit each party polling at least 25 per cent of the total vote cast at an election for members of the legislature to appoint as many representatives as the entire party vote contains tenths of the total vote cast. Fourth, the same result might be obtained by providing for the election at large of a small number of legislators by "quotas," according to the Hare plan.[1]

Now observe the effect of the application of the principles of the commission form of government for cities to the state government. The office of legislator has been made important and conspicuous because it is the only office in the state government (except that of governor) for which the voter casts his ballot, and because the successful candidate will cast one of two hundred ballots for the selection of the real executive. Under such a system it is certain that the voter will know in advance that a vote for candidate A means a vote for B, as the real

[1] See *ante*, p. 153.

executive or leader of the council of state. Thus a vote for state legislator will be a vote to confer the entire legislative and executive power of the state upon a given group of legislators and their leaders. We have indeed made the voting privilege of the elector so important that he will not only be sure to vote, but he may be expected to do much to keep himself fully informed about the candidates. We have made the act of voting so simple that the elector cannot fail to use such intelligence as he has and to spend any extra time which he may have in informing himself further. By providing for the election of single legislators from wieldy districts or by wieldy "quotas" we have brought the voter as near the candidates as possible. By stimulating the number of candidates we have given the voter as wide a range of choice as possible. These devices all have a tendency to eliminate the politically ignorant vote. The actual intelligence of the electorate is given the fullest possible play, and even stimulated to unusual efforts of comprehension. This is a guaranty, and it is the only guaranty, against

that political ignorance on the part of a large number of voters which provides the opportunity for the professional politician to step in and, in the guise of advising and directing the voter how to vote, in effect to cast his ballot for him. The essential condition upon which a vote-directing political machine is founded and maintained has, therefore, been eliminated. Under such circumstances a vote-directing machine, instead of slipping over, in the darkness and obscurity which comes from a multiplicity of elections and offices to be filled, those whom it can control, for ends of which the electorate does not really approve, must begin to appeal to the voter's intelligence with candidates of character, arguments, platforms, and pledges of legislation which those elected have the power to keep. Such activities on the part of any organization will at once change it from a mere vote-directing machine into a legitimate party with real principles and a real program. The leaders of such an organization will necessarily stand for election in the real government, which will now be the legal government. Real party

leaders will appear in the legislature with real party programs for legislation and real party responsibility.

We have, however, in the scheme of state government presented, not only done our utmost to destroy at the roots extra-legal unpopular government, but we have provided a government which can operate. We have cut off all bickering between the legislature and executive. We have given power to an executive council which will enable it to do something. We have constituted a government which will be inactive, not because its hands are tied, but because it chooses not to do anything. The leader of the successful party cannot say that he has failed to keep the party pledges because he had no power to act. No one, however, need fear that the concentration of power in the hands of a few will prove in any way dangerous to the liberties of the people. The council of state can exercise power only so long as it retains the confidence of a majority in the legislature. Even out of the season of elections the legislature will necessarily be sensitive to

public opinion, and a council of state that did not consider the effect of public opinion upon a majority of the members of the legislature could not long hold power. By frequent elections the majority may be changed and the council recalled in favor of the leader of an opposition. The effectiveness of voting will thus be enormously increased, for the electorate will not have to turn out a dozen different officers at several different elections in order to change control of the legal government. Voting at a single election does it. Upon a poll of the districts or of the "quotas" it is determined whether one set of legislators or another shall control the executive and legislative power centered in a single chamber. No government can be unpopular or an executive council remain in office against the will of the electorate under such a scheme of government. No government can remain in office and avoid the consequences of failure and inefficiency when so organized.

If such a scheme of government does not break the malign influence of an extra-legal

government founded upon a vote-directing machine, then such a power cannot be broken. If the scheme of government which has been outlined does not give the electorate a real opportunity to express its will through its representatives and to make that will into law and then enforce the law through those same representatives, then our attempt to achieve representative government will have failed and we shall have been unsuccessful in securing that which other nations, even though in form at least still governed by kings, have been able to achieve.

## CHAPTER XV

### CONTEMPORARY PLANS LOOKING TOWARD THE UNION OF THE EXECUTIVE AND LEGISLATIVE POWERS OF STATE GOVERNMENTS

Our state legislatures are now for the most part composed of members elected from fairly wieldy districts. Governmental changes then which look toward the application of the principles of commission government to the state, as outlined in the preceding chapter, have to do principally with the union of the executive and legislative powers. Several recent proposals for changes, coming from Illinois, Wisconsin, Kansas, and Oregon, indicate that legislators, governors, and political scientists with practical experience have concluded that the executive and legislative powers must be brought nearer together. The interesting fact, however, is that no plans have been suggested by which the legislature is to absorb the control of the executive power by placing it in the hands of the

leaders of a majority of the legislature. On the contrary, the proposals for bringing the executive and legislature nearer together have, with one exception, been along the line of conferring upon the executive greater power to control and coerce the legislature.

The Illinois House of Representatives at its 1913 session adopted a rule for which Representative Morton D. Hull was responsible. It provided as follows:

> When any bill or resolution is introduced for the purpose of carrying into effect any recommendation of the governor, it may by executive message addressed to the speaker of the house be made an administration measure. An administration measure may be sent to the appropriate committee, or it shall, upon request of its introducer, be sent to committee of the whole house. When such a measure has been reported out of committee, it shall have precedence in the consideration of the house over all other measures except appropriation bills. The house shall sit in committee of the whole for the consideration of administration measures on Tuesday morning immediately after the reading of the house journal.

This rule very plainly brings the executive and the legislature nearer together. It does so,

however, only by conferring upon the governor an important privilege which enables him to advance his legislative program.

The proposed amendment to the Wisconsin constitution providing for an initiative by the electorate at large for legislation[1] gives to the governor a practical method of coercing or "steam-rollering" the opposition of a hostile legislature. It provides for the submission to the electorate at large of any bill introduced into the legislature any time within the first thirty days of the session. This enables the governor to present all administration bills to the legislature and if they fail of passage he may then present them for enactment into law by the electorate at large. This is giving the governor power to promote and control legislation to a very great degree.

Governor Hodges of Kansas in his message to the legislature of March 10, 1913, in terms advocated the adoption of the commission plan of government for the state. As there outlined, the details of the plan were somewhat vague.

[1] Joint resolution 4A, introduced June 16, 1913.

It consisted apparently of a unicameral legislature containing one or two members from each of the eight congressional districts of the state, with terms of from four to six years. This legislative commission was to be in session as the exigencies of the public business demanded. The governor was to be ex officio a member and presiding officer of the commission or legislative assembly. We observe here no other union of the executive and legislative powers than occurs in a city government like that of Chicago, where the mayor is elected at large and vested with the executive power and presides over a unicameral council of comparatively few members exercising the municipal legislative power. Governor Hodges' suggestion would vest more power in the state executive than he now has, by reason of his being the presiding officer of the legislative body. Apart from this, it does not go farther than to propose a reduction in the size of the legislature. But even that part of the plan may be open to the objection that it violates the fundamental principle of the selection of representatives from wieldy geo-

graphical districts or by wieldy "quotas." On the whole, Governor Hodges' plan would seem to be one which, like the Hull rule in Illinois and the Wisconsin provision for an initiative, increased the power of the executive elected at large and diminished the importance and power of the representatives of the electorate.

The latest plans of the People's Power League of Oregon are set out in detail in certain constitutional amendments which are to be submitted to the people upon a referendum.[1]

We notice first of all a concentration of executive power in the governor by reason of the fact that he appoints his cabinet consisting of an attorney-general, a secretary of state, a treasurer, a printer, a superintendent of public instruction, a secretary of labor, a state business manager, and such others as may be provided by law. He appoints also all sheriffs and district attorneys throughout the state. These

[1] These were furnished to the author by Mr. U. S. U'Ren of Oregon City, Oregon. One is in the form of a letter dated December 28, 1911, asking for criticisms on the draft of constitutional changes. The other is in the form of an initiative petition for the submission of particular constitutional amendments (being a part of the entire plan of changes) for adoption by the electorate.

local officers, however, are subject to a recall by the electorate. The powers and duties of all state commissions are consolidated and vested in the governor and become a part of the executive powers and functions, excepting the railroad commission, the members of which are, however, appointed by the governor. The governor's power is further increased by giving to him and his cabinet officers seats in a unicameral legislature. It is made the duty of the governor to introduce all bills for appropriating money. While the legislature may reduce the amount of appropriations, it cannot increase them without the consent of the governor. The general veto power of the governor is taken away, but he would still seem to have power by promoting a referendum, to appeal to the electorate to override the legislature.[1]

The single-chamber legislature is to consist of 60 members not less than 2 of whom are elected from each district containing approximately as

[1] "The power of the governor to promote initiative and referendum petitions is not, however, increased by the suggested amendment. He has now the same rights in this as a private citizen but no official powers" (comment of U. S. U'Ren).

many sixtieths of the population as there are members to be elected from the district. The voter in no case is permitted to vote for more than one candidate. Hence each party would be expected to put up as many candidates as it estimated its strength to be in sixtieths of the population. The result is bound to be a minority representation, if there be any substantial minority. To obviate the minority having as much power as the majority each member elected casts as many votes in the legislature as there are voters who cast their ballots for him. The unsuccessful candidate for governor who receives the highest number of votes in his party is made a member of the legislature with a voting strength equal to the number of votes cast for the unsuccessful candidates of his party for places in the legislature. One might hazard the guess that a legislature so precisely representing the voting strength of all factions and parties was peculiarly liable to legislative deadlocks which would again vastly increase the opportunity of power in a governor who, with his cabinet, had places in

the legislative body and who possessed a vast power over appropriations.

On the whole these new plans from Oregon tend in the direction of magnifying a one-man-executive power at the expense of the legislature rather than the increasing of the power of the legislature by giving to its leaders the control of the executive power.

At the 1913 session of the Illinois legislature there was introduced by Senator Logan Hay a bill to establish what is now known as the Hay plan for a legislative commission. It provided for a joint legislative commission to consist of the governor, who was made ex officio chairman of the committee, the lieutenant-governor, the speaker, the chairmen of the committees on appropriations and judiciary of the Senate and the House, and five other senators and five other representatives, selected as other committees were, viz., in the senate by the resolution of that body, in the House by the speaker. The governor, lieutenant-governor, and speaker were to serve on the committee during their term of office and the other members till the

convening of the next General Assembly after their appointment. The commission was to be in session from the commencement of one regular session of the legislature to the commencement of the next. It was given power to prepare and bring forward a complete legislative program, including a budget of appropriations for the coming legislative session, and to establish a legislative reference bureau. It was given power to investigate the administration of any department of the state government and the expenditure of any appropriation made by the General Assembly. Such a plan was admirably designed to increase the power of the legislature by centralizing in its leaders power and authority to present a comprehensive and matured program before the legislature convened. At the same time it conferred no additional power over legislation upon the governor. On the contrary, it, in a mild way, actually attempted to secure additional control over the executive power. The mere existence of a standing legislative commission composed of the leaders of the legislature, with power at any

time to *investigate the administration of any department of the state government* or the expenditure of any money appropriated, was a continuing menace to the present executive isolation and irresponsibility.

The plan evidently met with determined opposition from the executive, for in the House it was amended so as to provide four members from the Senate and House instead of five, and these were to be *appointed by the governor.* The power of investigation by the commission was restricted to such as it was called upon to make by the governor, the General Assembly, or either house, and the power to investigate the administration of any department of the state government was entirely omitted. In this form the bill became one which would vastly increase the governor's power by delivering into his hands the authority of the commission and giving him recognized administration members of the legislature. A deadlock ensued between the House and the Senate, and the bill as finally passed contained a provision only for establishing a legislative reference bureau. In

the contest over the original plan and the house modifications we have a clear-cut recognition of the necessity of bringing the governor and the legislature nearer together. We also have presented a sharp dispute as to whether the governor shall have added to his power further authority over the promotion of legislation or whether the legislature shall increase its power by organization, and at the same time secure some control, if not an actual domination, over the executive power.

It is rather startling that in all the above proposals which look toward the closer relation of the executive and legislative powers we should find a strong tendency toward the increasing of the power of the single executive by giving him greater control over the legislative power. Historically the effort has constantly been to break down the power of the single executive. True, the executive in such cases was not subject to the electorate at frequent intervals. But frequent elections may not protect the governed from a vast number of errors of judgment and smaller tyrannies, executive

oppression and bad appointments, which do not become a matter of general knowledge or make a considerable issue before the electorate. Good executive government in the sense of one which is just and fair, well balanced, seeking improvements, and acting conscientiously in lesser affairs, comes more certainly from a small committee of experienced leaders than from a single man. The exchange of views by such a body and the reaction of one member upon another has a value which cannot be estimated. The single executive on the other hand is likely to have no fixed set of responsible advisers. He is too frequently swayed by the advice of the last man who reaches his ear.

In making constitutions it is quite as easy to unite the executive and legislative powers by giving the control of the executive power to a majority of the legislature as it is to hand the control of the legislative power over to the single executive. From the point of view of expediency there is much to be said of the plan which places the control of the executive power in the hands of the legislature.

# CHAPTER XVI

## THE SECOND-CHAMBER PROBLEM[1]

The institution of private property is still with us and likely to remain for some time. The acquisition and holding of private property is still the main object of our existence and doubtless will continue to be so. It is privately held property which pays taxes and supports the state. In any government property is entitled to fair consideration and protection. Special differentiated classes of property, such as railroads and other public-service plants, manufacturing interests, mines, and landlords' and farmers' holdings are entitled to fair consideration and protection. Indeed, the state that permitted indiscriminate assaults upon private property or upon differentiated

[1] Much of the argument in this volume is in support of the Short Ballot movement. It is only fair to say, however, that the leaders of this movement in the National Short Ballot Organization dissent from the suggestions put forward in this chapter as to the need of special protection to property interests, and the methods suggested of working out such special protection are, therefore, no part of the Short Ballot doctrine.

classes of private property could not long endure. Certainly its prosperity would be short-lived. These premises have not been questioned in the past. Not many in this day would be found to controvert them.

What sort of demand, then, was there, when our state governments were first organized, for governmental arrangements suitable to protect property interests? How was that demand answered in our mid-nineteenth-century plans of government? What is the character of that same demand today and how do our present governmental arrangements answer it? These are important inquiries preliminary to our ultimate question: How are property interests to be protected when the principles of the commission form of government are applied to the state?

It is the object of this chapter to attempt to answer in outline these questions.

Our federal government was established in a territory which was mostly a wilderness, with a fringe of frontier and colonial communities on the Atlantic seaboard. Whenever a state

government has been first established, the territory of which it has been composed has been either wholly or very largely of a frontier character. In such communities opportunity was abundant and pretty much equal to all. Men started with not much advantage except that with which nature had endowed them. The differences in wealth were not such as to be beyond the hope of most men to bridge in a lifetime. The population was controlled by a community of feeling and a certain similarity of occupation. In such a society any attack upon property interests was bound to come home to too many to make such an attack possible. The practical danger was that states would permit the resident debtor class to repudiate its obligations to a non-resident creditor class. This was headed off by the very practical provision of the federal constitution that no state should pass any law impairing the obligation of contracts. Apart from this the governmental devices adopted to protect property interests were largely theoretical and academic. They were for the most part directed to preventing all

sudden legislative action. Legislation must in every case be the result of "sober second thought." No distinction was made between legislation which affected property interests and any other sort. The safeguards for securing the "sober second thought" of the electorate or legislature were as applicable to the most trivial legislative matters as to the most important. Thus we have the separation of the legislature into two houses. The members of both are elected. The only difference is that the number of the upper house is smaller and the term a little longer. We have also the limited veto power of the governor. Although not in terms provided for in our constitution, it has become a part of our scheme of government that the courts shall exercise the power of declaring void acts of the legislature which are forbidden by the written constitution. As these written constitutions have contained almost universally the provision that "no person shall be deprived of life, liberty, or property without due process of law," the courts have had the power to declare void acts of the

legislature which they deemed to be a taking of the "liberty" or "property" of any person "without due process of law." When exercised this power has amounted in effect to a judicial veto. If the court deem the act in question to have been forbidden by the constitution the act is invalid until such time as the constitution shall have been changed and the general prohibition eliminated, at least so far as the offending act in question is concerned. It was, however, only the taking "*without due process of law*" which was forbidden. But legislation was itself "due process of law" unless it was arbitrary and irrational in its operation.[1] Thus an act which forbade the consumption of liquor by red-haired persons and which imposed a fine for the offense would be arbitrary and irrational in its application, and the imposition of a fine pursuant to the act would be a taking of the property of the individual without due process of law. But more than this, the arbitrary character of the legislative act must be clear beyond all reasonable

[1] *Hurtado* v. *California*, 110 U.S. 516.

doubt.[1] It must be so clear that two rational men could not differ about the matter.[2] These were the limits of the power of the court as originally laid down. It is apparent that with these limitations conscientiously observed the veto power of the court over legislation was of largely theoretical and academic value in protecting property interests. The fact is that this power of the courts to declare laws unconstitutional because they took some person's life, liberty, or property without due process of law remained practically unused during the first half of the nineteenth century. Perhaps there was no call for the protection of property interests from the legislature. Perhaps the limitations upon the exercise of the power of the court were too faithfully observed. It is not unlikely that both reasons contributed to the results.

[1] James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harv. Law Rev.*, 129, 139 ff.

[2] "The validity of a law ought not, then, to be questioned, unless it is so obviously repugnant to the constitution, that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy."—Per Chancellor Waties in *Adm'rs of Byrne* v. *Adm'rs of Stewart*, 3 Des. 466 (South Carolina, 1812).

Before 1860 the Atlantic seaboard states ceased to be provincial or frontier communities. Since 1860 an enormous area in the Mississippi Valley has ceased to be a frontier community. Great cities have arisen. Whole states have been brought under cultivation. Manufacturing has constantly gone forward. Facility in transportation has diminished the size of the country twenty-fold in many areas. The increase in the value and quantity of private property has been fabulous. So enormous an increase in so short a time has necessarily resulted in the concentration of immense fortunes in the hands of a considerable number of individuals. Even more marked has been the concentration of collective property holdings in corporations. The financial difference between persons of some property and those with vast fortunes is so great that the bridging of the gap by even the exceptional individual in his lifetime is out of the question. The financial difference between the position of persons possessing some property and the collective wealth of great corporations is

beyond the actual comprehension of the human intelligence. Opportunity is no longer anywhere near equal and many start the race in life with a lead which puts them out of sight of all but a very few. The result is that a constantly increasing number of people think not in terms of property and the interests of property, but as individuals, and in many instances as one of a collection of individuals. They have begun to consider whether the state is so run and legislation so framed that they as individuals, or as one of a collective organization of individuals similarly situated, are enabled to live satisfactorily. They are readily inclined to believe that specially organized property interests are attempting to make the laws, or to block the making of laws in the interests of property and against the interests of the individual, either singly or in organized groups. Such specially organized property interests have become liable to persistent and sometimes vicious and retaliatory attacks by a majority of the electorate. The fact that this majority is composed of persons who are, to

some extent, holders of property does not prevent them from thinking in terms of their position as individuals. Thus spectacular onslaughts by the electorate have been made upon such organized property interests as railroads, public-service corporations, and mine-owners. Legislation to promote social justice and in the actual or pretended exercise of the police power may be in effect an attack upon some legitimate business. Yet the general object of such acts will receive an overwhelming popular approval.

Step by step with the development of this antagonism in the state between specially organized property interests and the individual has grown the effort of such interests to combine for protection from the electorate. Naturally they use all the means at their disposal in the governmental scheme to secure that protection. The governor's veto, however, has proved of less and less value, for the governor is so conspicuous an officer as frequently to be a popular choice. Property interests have fallen back upon the legislative lobby, an alliance with

the extra-legal government, and the constant urging of the courts to go farther and farther in the exercise of their veto power over legislation. The lobby has gained power through the assistance and sanction of the leaders of the extra-legal government. That government has been stimulated to the highest efficiency and the greatest activity by reason of the prizes coming to its leaders as the result of their alliance and partnership with collectively organized property interests. As a last resort the courts have again and again been importuned to veto legislation inimical to specially organized property interests, and all property interests when attacked at once become specially organized at the point of attack. These importunities come in the form of arguments to the court on behalf of property interests that are unfavorably affected by the legislation in question. Frequently the act which they complain of has been badly drawn and is really vicious and unfair in some of its workings, although the main principle may be sound.

This intensifies the appeal of the individual for its overthrow. Such complaints from the interests affected, together with the social and economic theories of the judges themselves, and no doubt in some cases, the direct influence of the extra-legal government, have been pressed upon the judges in an effort to cause them to abandon the academic, theoretical, and bloodless function which was conceded to them when the power of the courts to declare acts of the legislature unconstitutional originally was asserted, and to expand this power so as to present an efficient barrier to the onslaughts of the proletariat upon property interests. At times and to a very considerable extent state courts have yielded to this pressure. It is the demand of specially organized property interests for protection and fair treatment and the inclination of the courts to give it that has presented in the last thirty years so long a list in every state of legislative acts held unconstitutional because they took the liberty or property of some person without due process

of law.[1] It is, no doubt, the desire of these same property interests that the clause of the fourteenth amendment of the federal constitution, which provides that "no state shall pass any law depriving any person of life, liberty, or property without due process of law," may in the hands of the United

[1] The results reached by the Illinois Supreme Court, especially when contrasted with those reached by the United States Supreme Court, exhibit an extreme exercise of the power of courts to hold legislation void because it takes the property or liberty of individuals without due process of law.

Since 1886 the Illinois Supreme Court has held void acts of the legislature compelling mine-owners to weigh coal mined and to pay the miners on the basis of such weight, because such acts took the mine-owner's liberty and property without due process of law contrary to the provisions of the state constitution: *Millett* v. *The People*, 117 Ill. 294 (1896); *Ramsey* v. *The People*, 142 Ill. 380 (1892); *Harding* v. *The People*, 160 Ill. 459 (1896). The United States Supreme Court, however, has held that a similar act from Arkansas did not violate the "life, liberty, or property" clause of the fourteenth amendment: *McLean* v. *Arkansas*, 211 U.S. 539 (1908).

Since 1892 the Illinois Supreme Court has held void state acts regulating the keeping of truck stores by owners of coal mines and factories, because they deprived such owners of liberty and property without due process of law, contrary to the state constitution: *Frorer* v. *The People*, 141 Ill. 171 (1892); *Kellyville Coal Co.* v. *Harrier*, 207 Ill. 624 (1904). In 1886 the Pennsylvania Supreme Court held void an act which prohibited the payment of wages to miners in anything but money: *Godcharles* v. *Wigeman*, 113 Pa. 431 (1886). Yet the United States Supreme Court holds that such acts are not in violation of the "life, liberty, or prop-

States Supreme Court afford the same practical and effective protection to property interests which similar clauses in the state constitutions have done through the action of state supreme courts.

Such is the actual situation into which it is now proposed to project alterations in our

erty" clause of the fourteenth amendment: *Knoxville Coal Co.* v. *Harrison*, 183 U.S. 13 (1901).

In 1896 the Illinois Supreme Court held void the barbers' Sunday law, which forbade the employment of barbers on Sunday, because the act violated the "life, liberty, or property" clause of the state constitution: *Eden* v. *The People*, 161 Ill. 296 (1896). But the United States Supreme Court sustained a like act from Minnesota, declaring that it did not violate the "life, liberty, or property" clause of the federal constitution: *Petit* v. *Minnesota*, 177 U.S. 164 (1898).

In 1900 the Illinois Supreme Court held void the state flag law which prohibited the use of the American flag for advertising purposes, because it deprived advertisers of liberty and property without due process of law, contrary to the provision of the state constitution: *Ruhstrat* v. *The People*, 185 Ill. 133 (1900). The United States Supreme Court, however, sustained a similar act from Nebraska holding that it was not in violation of the "life, liberty, or property" clause of the fourteenth amendment: *Halter* v. *Nebraska*, 205 U.S. 34 (1907).

In 1908 the Illinois Supreme Court held void the bulk sales acts regulating sales of stocks of goods in bulk otherwise than in the usual course of trade, because it violated the "life, liberty, or property" clause of the state constitution: *Off & Co.* v. *Morehead*, 235 Ill. 40 (1908). But the United States Supreme Court has held similar statutes from Connecticut and Michigan valid and not in violation of the "life, liberty, or property" clause of the fourteenth

scheme of government which will eliminate extra-legal government by politocrats and thereby lessen, if not entirely do away with, the lobby which is backed by the extra-legal government. The same changes are to give us a single legislative chamber which shall be really representative, highly sensitive, and quickly responsive to the popular will. Very

amendment: *Lemieux* v. *Young*, 211 U.S. 489 (1908); *Kidd, Dater & Price Co.* v. *Musselman Grocer Co.*, 217 U.S. 461 (1910).

In 1909 the Illinois Supreme Court held void the loan-shark act regulating the assignment of future wages as security for money borrowed and requiring the assignment to be recorded and signed by the wife. Again the reason was that the "life, liberty, or property" clause of the state constitution was violated: *Massie* v. *Cessna*, 239 Ill. 352 (1909). But the United States Supreme Court has sustained a similar act passed in Massachusetts on the ground that it did not infringe the "life, liberty, or property" clause of the fourteenth amendment: *Mutual Loan Company* v. *Martell*, 222 U.S. 225 (1911).

The Illinois Supreme Court has also held void, as infringing the "life, liberty, or property" clause of the state constitution, the following acts: (*a*) An act penalizing employers in the importation of workmen from another state by reason of deceit touching the matter of the existence of a strike or the sanitary condition of the employment: *Josma* v. *Western Steel Car Co.*, 249 Ill. 508 (1911); compare, however, *Williams* v. *Fears*, 179 U.S. 270; (*b*) An act providing that no public contractor shall employ alien labor on any public work: *City of Chicago* v. *Hulbert*, 205 Ill. 346 (1903). But in *Atkin* v. *Kansas*, 191 U.S. 207 (1903), the United States Supreme Court held valid an act of Kansas making it a criminal offense for a public contractor to permit or require an employee to perform labor upon public work in excess of eight

naturally property interests, particularly those most frequently subject to legislative attack, will wish to know how they are to be protected from the onslaughts of the proletariat or from the hasty judgments of an ordinarily conservative and fair majority. Property can point to the fact that the commonwealth under Cromwell gave up the single legislative chamber and reverted to the bicameral plan;[1]

hours each day; (*c*) The miners' washroom act, requiring owners of mines to provide a washroom at the top of the mine for the use of the miners: *Starne* v. *The People*, 222 Ill. 189 (1906); (*d*) An act prohibiting more than six persons sleeping in one room in a lodging-house: *Bailey* v. *The People*, 190 Ill. 28 (1901); (*e*) An act prescribing an eight-hour day for women in certain occupations: *Ritchie* v. *The People*, 155 Ill. 98 (1895). This case was approved in *Ritchie* v. *Wayman*, 244 Ill. 509 (1911), which, however, held a ten-hour labor law for women in certain occupations valid, following the ruling of the U.S. Supreme Court sustaining a similar act passed in Oregon: *Muller* v. *Oregon*, 208 U.S. 412 (1908). It seems entirely probable from its opinion in the last-mentioned case that the United States Supreme Court would have held valid the act condemned by the Illinois Supreme Court in *Ritchie* v. *The People*, *supra*.

[1] "The proposal for a revived Second Chamber was, on the contrary, carried with an unexpected degree of unanimity. The Protector pressed it strongly upon the officers. 'I tell you,' he said, 'that unless you have some such thing as a balance we cannot be safe. Either you will encroach upon our civil liberties by excluding such as are elected to serve in Parliament—next time for aught I know you may exclude four hundred—or they will encroach upon our religious liberty. By the proceedings of this

that the single chamber adopted by the French Constitution of 1791 was abandoned for a bicameral arrangement in 1795, and never again, except for a brief space under the Second Republic of 1848, did France renew the experiment. It can point to the opinions of Mill,[1] Lecky,[2] Maine,[3] Bagehot,[4]

Parliament you see they stand in need of a check or balancing power, for the case of James Naylor might happen to be your case. By the same law and reason they punished Naylor they might punish an Independent or an Anabaptist. By their judicial power they fall upon life and member, and doth the Instrument enable me to control it? This Instrument of Government will not do your work.'"—J. A. R. Marriott, *Second Chambers*, p. 38.

[1] "A majority in a single assembly, when it has assumed a permanent character—when composed of the same persons habitually acting together, and always assured of victory in their own House—easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls, makes it desirable there should be two chambers; that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year."

[2] "Of all the forms of government that are possible among mankind I do not know any which is likely to be worse than the government of a single omnipotent democratic chamber."

[3] "What, then, is expected from a well constituted Second Chamber is *not a rival infallibility, but an additional security*. It is hardly too much to say that, in this view, almost any Second Chamber is better than none."

[4] "With a perfect Lower House it is certain that an Upper House would be scarcely of any value. If we had an ideal House

and Sidgwick[1] in favor of the second-chamber plan and to the well-nigh universal practice of such a method of constituting the legislature. Furthermore, the second chambers established outside of the United States and perhaps Australia have in practice acted on the whole as the representatives of property interests and the protectors of those interests from the acts of the popular house. These experiences may contain no lesson for us and the opinions referred to may be hopelessly reactionary, but they would at least seem to justify property in humbly asking what is to be done to protect it from the actions of the single popular

of Commons perfectly representing the nation, always moderate, never passionate, abounding in men of leisure, never omitting the slow and steady forms necessary for good consideration, it is certain that we should not need a higher chamber. The work would be done so well that we should not want any one to look over or revise it. And whatever is unnecessary in government, is pernicious. . . . . But though beside an ideal House of Commons the Lords would be unnecessary, and therefore pernicious, beside the actual House a revising and leisured legislature is extremely useful, if not quite necessary."

[1] "The main end for which a Senate is constructed [is] that all legislative measures may receive a second consideration by a body *different in character from the primary representative assembly*, and if possible superior or supplementary in intellectual qualifications."

legislative chamber in which is united the executive and legislative power.

There are two ways at least of meeting this question:

The first is to do nothing at all. Property is to be persuaded that it is in the long run entirely safe at the hands of a legislature which is really expressive of the will of the majority and sensitive to that will; that property has money with which to advocate its cause and can buy newspapers, circulate pamphlets, and hire speakers; that the mass of the electorate are in general entirely fair and conservative toward property; that property is protected by the courts and by constitutional provisions prohibiting the taking of property without due process of law from sudden and violent legislative action.

This attitude will, however, hardly satisfy property interests. How they will be treated by a single legislative chamber representing the popular will cannot be determined till the experiment is actually tried. All a priori views are merely speculative opinions made

up from data wholly incomplete and inconclusive. Property interests will naturally regard it as unfair that they should take the risk of a new experiment in government. Nor will property be satisfied with protection by the courts as now constituted. The fact that judges are for the most part elected by popular vote, that the recall of judges and of judicial decisions is being violently advocated, will hardly tend to reassure property in the protection from the electorate by the courts to which it believes itself fairly entitled.

The second method of meeting the demand of property for protection from the single popular legislative chamber is to give it a direct representation in the legislature and a voice in the enactment of the laws at the time they are in the process of making. The representatives of property should have power to propose legislation, to amend that which comes from the popular legislative chamber, and to enter into compromises respecting it. They should have in addition at least a limited veto on the passage of laws. The exercise of such powers

should be open and legal, but at the same time entirely subordinate to the power of the representatives of the electorate in the single popular chamber. This requires the establishment of a second legislative chamber in which the representatives of property interests shall sit.

The most direct method of constituting such a second chamber is to divide the state into as many senatorial districts as there are to be members of the second chamber—let us say one-fourth of the number of the popular house. The districts should be created on the basis of an equal amount of taxable property in each. One representative should be sent from each district. One vote should be given each taxpayer in the district who during the preceding year had paid a given amount or less in taxes. Each taxpayer should have one vote in addition for each similar amount which he paid in taxes, and should vote as a taxpayer, whether a corporation or a non-resident citizen of the United States. It might be desirable to elect the senators at large from a few districts, the voting by taxpayers to be according to the

Hare plan, thus allowing groups of taxpayers to send their representatives.

A less direct method would be to fill the second chamber with members holding for life and appointed by the executive council of state. The natural tendency of such a life tenure of office, coupled with appointment from among successful men, is to produce a conservative second chamber. If, however, one party is in power for a long period it also results in the packing of the second chamber by one party for its own purposes and this brings renewed party strife and legislative deadlocks.[1] Such a second chamber will, however, in the long run, it is believed, represent property interests.

It would be, of course, of vital importance that a second chamber constituted in either of the above ways be kept in strict subordination to the chamber which represents the electorate at large. The principal means for accomplishing this has already been provided

[1] See J. A. R. Marriott, "History of the Canadian Second Chamber" in *Second Chambers*, pp. 145 ff.

for in the plan for the union of the executive and legislative functions in the lower house. The fact that the entire executive power of the state is placed in the hands of the leaders of the legislative majority of the lower house must always make that the more powerful organ of government. But we can go farther. It may be provided that the second chamber shall never have the right to reject an appropriation bill. This will prevent its ever interfering with the conduct of the government through the collection of taxes and the expenditure of money. Then a suitable method of "steam-rollering" the second chamber with regard to the passage of legislation may be provided as follows:

> After the rejection of any bill passed by the lower house in two successive sessions, the vote upon such bill shall be taken, with both branches of the legislature sitting in joint session and a majority of the votes in such joint session shall be sufficient to give the bill the effect of law.

By such devices the second chamber representing property interests as such will have

been given only a properly limited veto power upon legislation. At the same time, as a second chamber, it will have power to approve that which passes the popular house and to enter into compromises respecting it. The second chamber can undertake a popular defense of its action. These are important privileges. They aid in the production of laws which are fair to all. On the other hand, the second chamber is equally clearly cut off from ever gaining any ascendancy over that branch of the legislature which represents and is sensitive to the popular will.

We may, however, in the establishment of a second chamber representing property interests proceed with still greater indirectness and the utmost caution along a path on which we are already started.

Our highest state judicial tribunal is already possessed of a substantial veto upon legislation in the interests of property by reason of its power to declare acts of the legislature void because they take property "without due process of law." There are few, if any,

constitutions today in the United States which do not contain other prohibitions upon the legislature under which acts may be declared unconstitutional in the interests of property. The courts have already gone beyond the mere academic function of declaring acts of the legislature void only when they are utterly irrational and arbitrary in their discriminatory operation. The courts now boldly perform the function of protecting property from hasty, ill-advised, and unjust legislation. Heretofore, at least, public opinion has sustained the courts in the exercise of this function. The placing of this power in the hands of judges has insured its exercise by men who at least are not prejudiced against property and are inclined to give it a fair hearing. Judges must be selected from among lawyers, and hence must be men of some education and intellectual attainments. Since the main business of judges is to decide litigated cases arising between individuals, there is very naturally a demand that judges be selected from among the leaders at the bar. This means that there is a constant and legitimate pressure

in favor of the selection of men who will naturally give property as full protection as the power of the court will permit. Even lawyers of only fair success and ability in fifteen or twenty years of practice will acquire the property point of view. Practically all lawyers live in an atmosphere of enforcement of property interests. They cannot avoid being educated to see the unfairness of legislation which affects unfavorably property interests. It is not improbable that among those who secure seats in the highest court some will regard themselves as specially appointed to stand between property and the proletariat, and will do so with great determination, vigor, and judicial independence. Once selected, the judge in our highest courts holds for a longer term than other judges, and this fact fortifies him in a determination that property interests shall be dealt with fairly. All this has been accomplished without the electorate at large fully perceiving what has happened. The voter is still submissive to the apparently fair proposition that only lawyers of excellent standing

and ability should be elected to the highest court of the state. Little does he understand that success in selecting such men has established the rudiments of a second chamber which is designed to protect property.

The present arrangement, however, is on the verge of some reorganization. It is plain that the judicial veto is too drastic. It may stop all desired legislation along a given line till the constitution is changed. The difficulties of securing the desired amendment may not be surmounted for many years. Hence has arisen the plan for "steam-rollering" the judicial veto by a constitutional provision that whenever an act of the legislature has been passed at two different sessions and sustained by the electorate upon a referendum, it shall be deemed not to infringe the "life, liberty, and property" clause of the state constitution.[1] The electorate today is also becoming increasingly alive to the

[1] The phrase "recall of judicial decisions" is unfortunate, since it implies that the judicial function is taken over by the electorate and the judicial decision reversed, when all that is done is to amend the constitution so that the basis for the judicial decision is taken away in all subsequent litigation. The better phrase, it

fact that the courts, in holding legislation unconstitutional, have really abandoned a purely judicial function and have undertaken in a degree the political function of a second chamber in protecting property interests from the legislature. True, the action of the court is in form still judicial. It purports to apply the constitutional prohibition to the legislation involved in the particular litigated case arising between contending parties. But the court's decision, once made, is now acquiesced in by all departments of the government and all public officers, as a complete disposition of the act held void. The compiler of the statutes omits it from the compiled laws as being no law at all. The court does in fact veto out of existence an act of the legislature for the entire state government and the inhabitants of the state. It does this also in response to a very general prohibition upon the legislature, such as that "no

is believed, is the one used in the text, namely, "steam-rollering the judicial veto." See Albert M. Kales, "The Recall of Judicial Decisions," *Illinois State Bar Association Proceedings*, 1912, pp. 203–18; Herbert Pope, "The Recall of Judicial Decisions—A Criticism," 7 *Illinois Law Review*, p. 149.

person shall be deprived of property without due process of law"—a phrase so vague that it gives the court a discretion which approaches that of the legislature in considering whether a proposed act is wise and fair to property or not. The disclosure to the electorate that courts, in using their judicial veto, are really exercising a great political power has resulted in an increasing demand that judges should be elected as political officers; that their economic and social bias be known—in short, that they have a politico-judicial platform and be subject to the recall.

The tendency thus disclosed to treat the judges of our highest courts as political officers whose social and economic bias regarding legislation must be known in advance is, of course, ruinous to the performance of their ordinary judicial functions. The electorate will obtain what it wants, and perhaps what it may be entitled to, from the judges, but at the expense of the disruption of the whole judicial system. That would indeed be a calamity. Disorganization in the administration of justice, due to the

popular attitude toward judges and the courts, is even now beginning to be felt. It will very soon become apparent that in the rebuilding of our judicial system courts which handle the general mass of litigation must be confined strictly to judicial functions. They must administer the law as established by the legislature and always in subordination to the legislature. If, then, we are to keep our present plan of protecting property by means of a court and a constitution, a special court of last resort must be established for deciding all constitutional questions, the validity of all municipal ordinances, and all other classes of cases where the issue is drawn between the electorate acting through a popular legislative body, and property interests. In order that the veto of the court may not be too drastic in its effect, there should be given to the single chamber legislature the power to "steam-roller" its judicial veto by a second passage of the act after a suitable interval and its approval on a referendum. Thus we shall have evolved a

practicable second chamber protecting property interests.

It would be only a short step to provide for the submission of all acts to such a court before they became laws, with a right on the part of litigants to bring up the question of the validity of the acts as upon a rehearing. Then it would seem most reasonable that when an act was presented to the special court of appeal before it became law and found to be unconstitutional, the court should have power to redraft the act so that it would accomplish what was desired so far as the same was permitted by the constitution. If ultimately the right of litigants to attack the validity of any act which had passed both the legislature and the court should be cut off, and if the constitutional limitations upon the legislature should entirely disappear, while at the same time the members of the body which scrutinized the acts passed by the popular chamber were appointed by the council of state and held office for a considerable period, we should have, in what started as a judicial tribunal, a real second

chamber functioning like other second chambers in furnishing an additional security against legislation which was unfair to property interests.[1]

[1] Ramsay Muir, in *Peers and Bureaucrats*, has a suggestion for a second chamber that should not be ignored. He finds the evil of a popular chamber containing a large number of representatives from wieldy districts selected by pluralities merely to be that it makes government by party a necessity. The parties tend to form themselves into two great camps, with two great programs. The electorate has been driven to choose one program or the other, though if all shades of opinion could be examined some part of each program would not receive a majority of votes. Party discipline, however, becomes so strict that the first chamber can put through every part of the party program. The real need in the second chamber, he declares, is to secure members of independent views who can express their opinions freely without fear of the loss of their seat as a punishment for having been independent, and which will represent the different shades of opinion on the part of the electorate. He, therefore, advocates the selection of members of the second chamber by the method of proportional representation by the single transferable vote according to the Hare plan.

The difficulty with this proposal is that property interests as such are not represented except according to the numerical strength of property owners. In fact, Mr. Muir expressly repudiates any idea of creating a second chamber based upon an aristocracy or the middle class of income taxpayers. His plan might also be expected to involve a contest as to which chamber really represented the electorate. The second chamber as proposed by Mr. Muir would certainly be a "rival infallibility" and hopeless deadlocks might be expected. There would then be the usual American spectacle of bickering between the executive as represented by the executive council or cabinet of the first chamber, and the second chamber representing the electorate. On the whole the union of the executive and the legislative powers so much to be desired would be broken in upon.

It is not the purpose of the present writer to advocate either the second chamber representing property interests or the establishment of a unicameral legislature in which all legislative and executive powers are united and which is extremely sensitive to the popular will without any special protection to property interests other than that which their numerical strength and property holding gives them. It is enough that the difficulties of the situation be faced and the several general lines of procedure be indicated. It will be time enough to have opinions when we are brought, by constitution-making, nearer to the practical settlement of the difficulty.

# CHAPTER XVII

## METHODS OF SELECTING AND RETIRING JUDGES

Justice is not administered by an executive head planning how a large number of employees shall do clerical work or tend machines. Its ultimate source is in the operation of the mind of the judge upon certain facts presented to him in a judicial investigation. The power of the state to preserve order and settle the rights of parties is subject to be invoked in one way or another, according as the judge's mind reacts and operates. Clearly, therefore, the way in which the minds are selected for this important public duty and the way they are retired is of the first importance to the due administration of justice.

It may be that in some frontier or sparsely settled rural districts where extra-legal government does not exist, judges are in a degree really elected by the people. It may be that in such communities the electorate does actually

pick out that one among the lawyers whom it wishes to act as judge.

There may be other communities which are well satisfied with the results obtained by special judicial elections at which the candidates are nominated by petition only and where the ballot is in form non-partisan. An analysis of conditions in such communities will usually show that extra-legal government by politocrats is very weak or non-existent, and that the power of selecting and retiring judges really resides in the lawyers, subject only to the approval of the electorate.

In a metropolitan district, however, where there is a large population and a governmental plan which reduces the most intelligent inhabitant to an extreme degree of political ignorance as a voter, and the establishment of extra-legal government by politocrats is thus secured and fostered and becomes the real government, the judges, though the electorate regularly votes to instal them in office, are not in fact elected at all. They are appointed. The appointing power is lodged with the polito-

crats of the extra-legal government. These men appoint the nominees. They do it openly and with a certain degree of responsibility under the convention system. They do it less openly and with less responsibility when primaries are held.

If you wish to test the soundness of these conclusions inquire your way to a judgeship in such a district or listen to the experiences of the men who have found their way to a judgeship or have tried to obtain the office and failed. In almost every case the story is one of preliminary service to the organization, recognition by the local organization chief, and through him recognition and appointment of a nomination by the governing board of the party organization. Those who do not go by this road do not get in. The voter only selects which of two or three appointing powers he prefers. Whichever way he votes he merely approves an appointment by politocrats.

The judges in a metropolitan district where the extra-legal government rules and where elections for judges are held are not subject

to a recall merely. They are subject to a progressive series of recalls. They are subject to recall by the politocrats who sit upon the governing board of the party organization. These may refuse a nomination at the time of an election. If the judge secures the nomination he may be recalled by a wing of the organization knifing him at the polls. He may be, and frequently is, recalled by reason of an upheaval upon national issues. In the case so rare that it is difficult for one with a considerable experience at the bar in a city like Chicago to remember it, a judge is actually recalled because of popular dissatisfaction with him. If there now be added the recall by popular vote at any time during the judge's term, we shall have presented the politocrats with a continuous hold upon the judge. Their power may at any time be used to initiate recall proceedings against him, and the individual without any real popular following will have but little chance against the tremendous power of a successful political organization. The recall of a judge by popular vote at any time will

give a like opportunity to a particular faction of the political organization to attack a judge it does not want. Such a recall will likewise give to a party which has a chance of sweeping all before it in a national election an opportunity to initiate a recall of some at least of the judges of the opposite political party. Of course, the recall election will also give the electorate at large an opportunity to retire a judge at once in the rare case where there is a real popular uprising against him. It does not take any great degree of intelligence to estimate whether such a recall by popular vote will be of greater advantage to the extra-legal government by politocrats or to the electorate at large.

The plain truth is that in a metropolitan district the selection of judges by some sort of appointing power cannot by any possibility be avoided. The position of a single judge out of as many as thirty and upward in a district containing an electorate of a hundred thousand and over is too hidden and obscure to enable any man who is willing to occupy the place to

secure a popular following. The man who has a real hold upon a majority of so numerous an electorate will inevitably be led to a candidacy for governor of the state or senator of the United States, if not indeed for president of the United States. Another obstacle to the actual choice of judges by so numerous an electorate is that the determination of those fit to hold judicial office is unusually difficult. It would be a problem for a single individual who had an extensive personal knowledge of the candidates and had observed them closely for a considerable period in the practice of their profession. For all but the most exceptional judge in a metropolitan district the power which places him in office and retires him from office will be an appointing power, although there be in force the so-called popular election of judges. So long as extra-legal government by politocrats is the real government, that appointing power will be lodged in the politocrats who wield the power of that government.

There are many who sincerely believe that the ideal functioning of the electorate in a

metropolitan district where the extra-legal government is strong, may be restored if judges are elected only at special elections where a judicial ballot is used which omits all designation of parties and upon which the names of candidates are placed by petition only and the name of each candidate is rotated upon the ballot so that it will appear an equal number of times in every position. The object of such legislation is to restore a choice by the electorate by depriving the extra-legal government of its predominant influence in judicial elections. The means adopted to deprive the extra-legal government of its influence is to take from it the use of the party circle and the party column. It may safely be predicted of such legislation that it will not cause judges to be the actual choice of the electorate, nor will it eliminate the influence of the politocrats in judicial elections.

The supposition is that if the influence of the politocrats can be eliminated the electorate will necessarily make a real choice. But the electorate does not fail to choose simply

because the politocrat has taken that choice from it. On the contrary, the politocrat rules because the electorate regularly goes to the polls too ignorant politically to make a choice of judges. That ignorance is due to the fact that the office of judge is inconspicuous and the determination of who are qualified for the office is unusually difficult, even when an expert in possession of all the facts makes the choice. The proposed method of election does not in the least promise to eliminate the fundamental difficulty of the political ignorance of the electorate. If, therefore, it succeeded in eliminating the influence of the extra-legal government the question would still remain: Who would select and retire the judges? There is no reason to believe that the electorate would make any real choice. Electors would be just as politically ignorant as they were before. They would be just as little fitted for making a choice as they were before. The elimination of extra-legal government does not give to the electorate at large the knowledge required to vote intelligently. Who, then, will

select and retire the judges? The newspapers might have a larger influence, but they would probably be very far from exercising a controlling influence or uniting in such a way as to advise and direct the majority of the voters out of an electorate of several hundred thousand how to vote for a large number of judges. Special cliques would each be too small to control a choice and combinations would be too difficult to make. The basis of choice would, therefore, be utterly chaotic. There could be neither responsibility nor intelligence in the selection of judges. The results reached would depend upon chance or upon irresponsible and temporary combinations. With every lawyer allowed to put up his name by petition and chance largely governing the result, the prospect is hardly encouraging.

There is no reason to believe, however, that any such disorganized method of choice would be tolerated. The most potent single power in elections would end it. That power would be the extra-legal government. Its organization would be put to greater trouble in advising

and directing the politically ignorant how to vote, because it would have been deprived of the party circle and party column. But the advice and direction could and would be given and followed. Each competitor for the power of the successful extra-legal government would have its slate of candidates. Each would prepare separate printed lists of its slate to be distributed at the polls and the voter would for the most part, as now, take the list of that organization he was loyal to or feared the most, and vote the names upon it no matter where they appeared upon the ballot. Thus the appointment and retirement of judges by the extra-legal government would, after perhaps a period of chaos and readjustment, again appear. Perhaps it would be even stronger as a result of reaction and deliverance from the chaotic conditions which it relieved.

It is impossible to escape the conclusion that in a metropolitan district with one hundred thousand voters and upward, the selection of judges by the electorate is practically impossible. It is equally certain that the judges in

such a community must be selected by some appointing power. The real and only question is: What is the best method of appointment?

No method could be worse than that which we now employ. Appointment by the politocrats of the extra-legal government is so obscure, especially when effected by primaries, that they are under no responsibility whatever in naming judges and they have little interest in the due administration of justice. Indeed, the situation is worse than that, for they may have positive reasons for wishing a type of man from whom they may expect certain courses of action which will actually be inimical to the efficient administration of justice, particularly in criminal causes; or they may be interested in filling judicial offices with those who have done more in the way of faithful service to the organization than in the way of practice in the courts.

From time to time, therefore, suggestions have come from members of the bar of ways and means for reducing the influence of the

appointing power of the politocrats. It has been suggested that the bar association should be given power to place upon the official ballot a bar-association ticket upon which might appear candidates who had been nominated by any of the other political parties. This would give the candidates approved by the bar association and also by any other political party considerable advantage over those appearing in only one party column. To that extent it would throw a greater influence into the hands of the lawyers. The question, however, has arisen whether this would result in a greater power in an unbiased bar association to select good judges, or in the lining-up of lawyers in groups which were controlled by the leaders of the politocrats. The effort is frequently made to provide that all judges shall be elected at a special judicial election. This course may prevent the recall of judges because of an upheaval on national issues. It does not, however, interfere with the appointment of a nomination by the politocrats in the first instance. Even when the nominations are all

by petition and the party circle eliminated and the names of candidates rotated upon the ballot, resort must still be had to the extra-legal government to escape absolute chaos and selection by mere chance.

Nothing of great value can be accomplished until it is recognized that the judges in a metropolitan district are certain to be appointed and that the only proper appointing power is one which is conspicuous, legal, subject directly to the electorate, and interested in and responsible for the due administration of justice.

This principle may be worked out in a variety of ways.

When the state executive as now constituted is given power to appoint directly, or to appoint indirectly by designating the nominees to be voted upon, the principle is worked out in one way. There are, no doubt, serious objections to both methods of executive appointment. The governor of the state is, of course, in the midst of politics. He is also in the midst of a legislative program, and the temptation is very strong to trade judicial places for the progress

of administration measures in the legislature. Then the governor is not particularly responsible for the administration of justice, that being a matter for the judicial department rather than the executive. But this much can be affirmed, that any mode of appointment by the governor, since it is conspicuous and legal, and since the governor is directly subject to the electorate, carries with it a measure of responsibility which is not found where the appointment is secret and by the politocrats of the extra-legal government. Appointment by the governor is better than the present misnamed plan of popular election.

It might be suggested that the power of appointment could be lodged in the highest appellate tribunal of the state, the members of which had terms of considerable length, but were subject to election. This again is, no doubt, open to objections. But again, it could not possibly be a worse method than the one now employed. Judges of such courts are more easily than governors made responsible for the due administration of justice. They would have

stronger motives than the governor for appointing men who could best carry on the administration of justice. No body of men in the state has a better opportunity for determining the character and ability of lawyers, since they examine the work of lawyers continually with most minute care.

It has been suggested that vacancies in the judiciary should be filled by the appointment of the chief justice of the metropolitan district. He in turn should be chosen by the electorate of the district at fairly frequent intervals—viz., every four or six years—and in him should be vested large powers to oversee and direct the mode of organizing and handling the business of the court.[1]

[1] The following extract from the letter of Mr. Charles H. Hartshorne, of Jersey City, N.J., to the author dated November 4, 1912, explains the plan of administering the chancery jurisdiction in New Jersey: "The constitution of New Jersey provides that 'The Court of Chancery shall consist of a Chancellor.' The Chancellor is appointed by the Governor with the approval of the Senate, for a term of seven years. He is usually reappointed, though it is an open question whether this office is an exception to the custom that judicial officers of the superior courts shall be reappointed, regardless of their political affiliations, so long as they are capable of giving efficient service. That custom has resulted in our having upon the Bench of the higher courts, judges

The objection which will at once be raised to this is that it presents an opportunity for the politocrats to obtain vast power by securing control of the chief justice. It is not difficult to demonstrate that the lodging of the appointing power in the hands of a responsible and conspicuous chief justice controlled by the politocrats would be much less inimical to the administration of justice than the appointment of judges in secret and without responsibility by the politocrats directly. The chief justice would, of course, only fill vacancies occurring during his short term. The guaranty to the public that such vacancies would be filled with

who have served for very long periods—twenty-five years and upwards.

"A number of years ago, the work of the Court of Chancery having become too great for one judge to dispose of, a statute authorized the appointment by the Chancellor alone (without confirmation by any other authority) of a Vice-Chancellor, as assistant. By further statutes, the number of these was increased to seven. The Court now consists of a Chancellor and seven Vice-Chancellors, who sit separately in different parts of the State. The Vice-Chancellors are appointed for seven-year terms. That Bench is generally regarded as the strongest in the State and has given entire satisfaction to the Bar and to the public.

"The Vice-Chancellors hear interlocutory motions in nearly all cases under a standing rule of the Court, but they conduct trials and final hearings only upon an order of reference from the

fairly efficient men lies in the fact that enormous responsibility for the due administration of justice is focused upon a single man. Every complaint of inefficiency and impropriety comes home to him. Such a man cannot carry on the work of the court without the most efficient judges that he can possibly secure. This leads necessarily to procuring as judges members of the bar who have, in a successful practice in the courts, had a proper service test. Assuming that such a chief justice were the recognized deputy of the politocrats he would be driven by the necessities of the case, by the conspicuousness of his position, and the force

Chancellor. After trial they write the opinion of the Court, which is usually reported, and advise the decree, which is then signed by the Chancellor. No appeal lies from their decree to the Chancellor, but all such decrees may be appealed directly to the Court of Errors and Appeals.

"Theoretically, the Vice-Chancellors are merely referees who report and advise the Chancellor, the decree being made by him upon their report. In actual practice however, they are members of the Court of Chancery, in fact (but not in form) making the final decree of that Court.

"The system has worked very satisfactorily in respect to the character and attainments of the members of that Bench, but the work of the Court in populous cities is a good deal in arrear. This is due to the volume of business having outgrown the number of Vice-Chancellors."

of public opinion, to do his utmost to persuade the politocrats to permit him to appoint efficient men. That would produce an appointing power far better than the secret and utterly irresponsible method of direct appointment by the politocrats which now exists. A much more desirable result than this, however, is to be expected. Such a chief justice would be so important and conspicuous an officer and his power so great, that in his nomination and election the desires of the electorate as a whole would have to be much more fully considered than is the case where the politocrats appoint to a nomination and seek the election of an obscure member of a bench composed of thirty members and upward.

All fear of the chief justice having too much power and falling too much under the influence of the politocrats and extra-legal government may be dissipated by making adequate provision for his retirement. The chief justice would, of course, be subject to impeachment. He might also be retired by a legislative recall by a vote of three-fourths of the members of

the legislature after an opportunity for defense and for cause entered upon the journals,[1] or by the governor upon an address of both houses of the legislature.[2] The fact that the chief justice held office only for a short term would in fact subject him to a recall by popular vote at the end of each period. To this might, with perfect propriety, be added the recall of the chief justice and election of his successor by popular vote during the regular term. Surely such safeguards are ample to protect the electorate from any abuse of the appointing power conferred upon the chief justice.

A chief justice who is retired at the end of his term by failure to be re-elected should, however, have the right, if he so chooses, to remain one of the judges of the court upon the same footing as an appointed judge and subject to assignment to duty by his successor. This is proper because the election goes only to the matter of his political position as the chief justice exercising an appointing power

[1] Illinois Constitution 1870, Art. VI, sec. 30.

[2] Massachusetts Constitution, chap. iii, Art. I; 38 and 39 Vict., Ch. 77 (Jud. Act 1875), sec. 5.

and administrative powers with respect to the organization of the court and the way its business is handled. The electorate has nothing to do with his fitness to decide litigated causes. Furthermore, the fact that a failure to be re-elected will not send the chief justice back to the practice of the law, which he has given up, will insure greater independence on his part while holding office as chief justice. It will also be an act of fairness to him, since a profession once given up during six or eight years for a place upon the bench is difficult and frequently impossible to recover. In addition to this it is best for the administration of justice itself that ex-chief justices who cannot regain their position in practice and are pitiful reminders of former greatness should not be left derelicts at the bar. But if a chief justice upon failure to be re-elected chooses to take his place as a judge in the court, he should not be permitted again to be a candidate for chief justice. It will not do to have in the court the rival of the sitting chief justice with a motive for making trouble.

The principal objections to the appointment of judges have been that they necessarily hold for life and become arbitrary and exercise judicial power in a manner distasteful to the lawyers, their clients, and a majority of the electorate. It will usually be found on analysis that the objectionable exercise of judicial power by an appointed judge is due to the fact that appointment means a life tenure. Hence the real objection to the appointment of judges as such is that when appointed they have held office for life. The entire objection, therefore, to appointment may be met by limiting the tenure of the appointed judge and by a variety of provisions for his retirement. He would, of course, be subject to impeachment. He might very well in addition be subject to some mode of legislative recall such as was proposed for the chief justice. His term may be limited to five years or seven years, thus requiring a retirement at the end of each period unless a reappointment is made. The judge appointed by the chief justice may even be subject to recall by popular vote according to one or the

other, or both, of two plans. The appointment might be for a probationary period—say three years—at the end of which time the judge must submit at a popular election to a vote on the question as to whether the place which he holds shall be declared vacant. This is not a vote which puts anyone else in the judge's place, but a vote which can at most only leave the place to be filled by the appointing power. Such a plan must necessarily promote the security of the judge's tenure if at the popular election his office be not declared vacant. After surviving such a probationary period his appointment should continue for—let us say—six or nine years. At the end of that time the question might again be submitted as to whether his place should be declared vacant. If thought necessary further to protect the electorate from the bogey of an appointed judge, he might be subject to recall at any time upon the petition of a percentage of the electorate. But this recall, like the other, should present only the question of whether the judge's place should be declared vacant, leav-

ing the vacancy, if created, to be filled by the appointing power. The danger in the existence of both these plans of popular recall is that they may be used with more effect by any extra-legal government of politocrats than by the electorate at large. It is highly improbable that the electorate would find it necessary or advisable to use either mode of recall. The presence of either mode would, therefore, furnish a means whereby an influence of the politocrats upon the judiciary could be continuously maintained.

It is, however, a grave mistake to suppose that judges exercise their judicial power in a distasteful and arbitrary manner merely because they hold for life or during good behavior. An arbitrary or disagreeable course of action by a judge arises principally from the fact that he is subject to no authority which can receive complaints against him and act upon those complaints by way of private or public criticism and correction of the judge. The best protection against arbitrary and disagreeable actions by judges is a duly constituted body of

fellow judges who hold a position of superior power and authority and to whom complaints as to the conduct of judges may be brought and who may investigate those complaints and exercise a corrective influence. When a considerable number of judges in a metropolitan district are provided with a chief justice and organized for the efficient handling of a great volume of business, the means of securing the exercise of a corrective influence over their conduct at once appears. Such a court must be organized into divisions for the purpose of handling specialized classes of litigation. In a metropolitan district like Chicago there should be an appellate division with from six to nine judges sitting in groups of three, a chancery division of six judges with a corps of masters, a probate and family relations division with at least four judges and a corps of masters and assistants, a common-law division with fifteen to eighteen judges and a corps of masters, and a municipal court division with thirty-three judges. The chief justice should be the presiding justice of the appellate division and each

of the other divisions should have a presiding justice with large powers over the way in which the work of each division is handled. The chief justice and the presiding justices of divisions should form a judicial council or executive committee, with considerable powers over the way the court as a whole is run. To such a judicial council there should be committed the power to remove from office any judge, other than the chief justice, and to reprove, either privately or publicly, or transfer any such judge to some other division of the court for inefficiency, incompetency, neglect of duty, lack of judicial temperament, or conduct unbecoming a gentleman and a judge, for the good of the service, or to promote its efficiency. The power of removal by the council should be exercised only where written charges have been filed and after an opportunity has been given to the judge to be heard in his own defense.

The existence of a judicial council composed of the chief justice and the presiding justices of the different divisions of the court, each one

responsible for the way in which the work of his division is handled, suggests also a practicable way in which to stimulate efficiency at the bar, provide a service test for candidates for places on the bench, and subject the appointing power of the chief justice to a slight but reasonable control. The judicial council should be given power to appoint upon an eligible list for each division of the court twice as many members of the bar as there are judges in the division. The chief justice, in appointing judges to a place in any division of the court, should be required to select from this eligible list on the occasion of every other appointment at least. The operation of such a plan would be to place in the hands of the presiding judges of divisions an express authority to suggest what members of the bar practicing before their divisions respectively would make satisfactory judges for each division. It would also operate to stimulate the efforts of lawyers and promote competition to secure places upon such eligible lists by specialization in practice before particular divisions. This would develop an expertness

in the handling of litigation which does not now exist on the part of any considerable number of the bar.

We may then conclude that in a metropolitan district with a hundred thousand electors and upward judges cannot be elected. They must be appointed. If an election is attempted it is a failure and appointment results. The worst method of appointment is the secret and irresponsible appointment by politocrats. The most promising is the conspicuous and legal appointment by a chief justice elected at large in the district at frequent intervals. Every objection to such a plan and every prejudice against it may be met by provisions for the retirement of the chief justice and his appointees by impeachment, by legislative and popular recalls, and by the power of the judicial council to discipline and remove any judge other than the chief justice. It is even possible under such a plan to promote efficiency by securing an eligible list of men whose experience in practice under the eyes of the judges insures excellence in appointment.

## CHAPTER XVIII

### CHANGES IN THE PLAN OF THE FEDERAL GOVERNMENT

The federal government is already organized upon a plan of centralized power. The ballot which it presents to the voter is always short. The voter casts his ballot for a president and vice-president every four years and for one congressman from his district (and perhaps one or two from the state at large) every two years. United States Senators hold office for six years. Until the adoption of the recent 17th Amendment two were elected by each state legislature. Now two are elected at large in each state. The judges are appointed by the president with the approval of the Senate. The Senate has a general veto power on Executive appointments. Such in form at least is the organization of the national government.

Today, however, extra-legal government has laid its hand to some extent at least upon the

government at Washington. In congressional districts where extra-legal government flourishes, it has become the strongest and most persistent single force in the election of congressmen. Naturally it has its loyal supporters in the House of Representatives of Congress. As the power of extra-legal government grows and becomes more widespread its influence in that house will grow. It is, of course, entirely immaterial whether a supporter of the extra-legal government is labeled Democrat or Republican. He is a Democrat when he comes from a district where the vote-directing machine operates successfully under that name. He is a Republican when the vote-directing machine operates successfully under that name. The power of extra-legal government which has appeared in the Senate of the United States is the direct consequence of the power of extra-legal government in the state legislatures. Of course, extra-legal government does not often control a majority of the members of both houses of a state legislature. A considerable minority, however, who hold together under a

strong leadership can wield a large influence. One of the reasons for the persistence of the fight upon Mr. Lorimer and its popular support throughout the country was the fact that his election represented to the popular mind in a striking manner the invasion of the United States Senate by extra-legal government. No matter how free from corruption Mr. Lorimer may have been, the power so openly wielded by those allied with extra-legal government to place him in the United States Senate presented itself to the people of the country as a menace to the nation. Yet a similar invasion has been going on steadily in quieter ways. Every gain of extra-legal government in the control of state legislatures has been a step farther toward a predominant influence in the United States Senate. It has been for the most part through senators who have supported, or at least felt that they must placate the power of extra-legal government in their states, that that government has obtained its hold upon the federal judiciary. The president's appointments must be approved by the Senate.

Senatorial custom, sometimes called courtesy, places the control of the Senate's approval in the hands of the senators from the state for which the judicial appointment is made. The two senators from the state sometimes divide the federal judicial districts in the state between them. Thus has the president's appointment to the lower federal bench been placed at the mercy of two, or perhaps a single senator. The president on his part may have a popular legislative program which he is pledged and is attempting to secure action on from Congress. The support of senators is necessary. The tendency, therefore, on the part of the president to allow senators the upper hand in his appointments to the bench has been very marked. Extra-legal government has in the last few years become a visible force in the selection of the president of the United States through its power to control delegates sent to the National Convention. At both the Democratic and Republican National Conventions in 1912 the numerical strength of the delegates representing extra-

legal government in particular states or districts of states was very marked. In the Republican Convention these delegates and their allies not only controlled the situation, but actually took issue with the delegates who represented the electorate and beat them. This was not a matter which could end when one faction cast more legal votes at the convention than the other. The contest was one between the forces of extra-legal government and delegates for the moment actually representing the popular choice. The contest between two such forces can be settled only when one or the other has been swept from the field. The triumph legally of the forces of extra-legal government in the Republican Convention could have no other logical outcome than the formation of a new party.

The recent change effected by the seventeenth amendment providing for the popular election of senators was made avowedly for the purpose of ousting the control of extra-legal government in the Senate. We may be sure, however, that the change will not in the least tend to drive

extra-legal government from the field at large. It follows, therefore, that the politocrats will use all their power to control nominations and elections to the United States Senate. The office of senator, however, is conspicuous and extremely important. This fact alone will force the politocrats to put forward or support candidates of some independence and popular strength. This will naturally result in the United States Senate becoming far more representative of the electorate than is the House. We may, therefore, expect the Senate to become less conservative than the House. If this continues in a marked degree, it means the entire decadence of the House as a legislative body. Its power will be exercised by the leaders of the house majority in the interests of a conservative check upon the Senate. Whether this condition would survive the elimination of extra-legal government in our local municipal and state governments seems beyond the possibility of prediction.

Other proposals for changes in the plan of the federal government have been made with

the avowed object of eliminating extra-legal government by politocrats. The influence of extra-legal government in national conventions is to be permanently overthrown by presidential primaries. If any change were to be made in respect to the judiciary it would be in the direction of making them elective, and perhaps subject to the recall. No doubt nominations through primary elections would be advocated for all elective officers. Newspapers recently gave space to the demand that the postmasters should be elected by the voters of the post-office district. Whatever temporary advantage over the extra-legal government there may be in any of these expedients, they represent the application of the very principle of government which in the long run produces, and must always produce, the disease from which we are suffering and desire to be cured. This is our process of curing the ills of democracy with more democracy. It is the case of more poison for one already overcome. Have the past thirty years not yet taught us that to increase the burden upon the voter is to reduce the

most intelligent member of the electorate to the darkest political ignorance and thus to enable the professional adviser and director to the politically ignorant voter to cast his ballot for him? Every additional appeal to the electorate is a step toward that scheme of government which is most favorable to the growth and development of extra-legal government by politocrats. The federal government is suffering because in the village, the township, the city, the county, and the state, such political burdens have been placed upon the voter that he cannot perform his political functions intelligently. He is forced to delegate them to those who make it their profession to carry his political burdens for him. To them he turns over the privilege of casting his ballot for him. It would be amusing if it were not tragic that the increase of the cause should be selected as the cure.

The elimination of extra-legal government from our villages, townships, cities, counties, and states has become a national problem. The proper functioning of the national

government is impossible while these sources contribute to the existence of extra-legal government. The reduction of governmental agencies to two—a local municipal government and a state government—the application of the principle of the commission form of government to both, so that the electorate casts its ballot for one officer only in each, and the consequent disruption of extra-legal government, are essential to the restoration of the federal government to political health. The plan of the federal government taken by itself and as an instrument of government in its appropriate sphere is still admirable. If it were the only governmental agency in the field, extra-legal government would never have had a chance to achieve power in the United States. If any improvements in the plan of the federal government are ever found necessary they should be in the direction, first, of uniting the executive power and the legislative power, and second, the elimination of the Senate veto upon executive appointments. The former may be accomplished by placing the control of the executive

power in the hands of the president and his cabinet or in a so-called council of state composed of the president and his cabinet officers and also requiring that each cabinet officer must be a member of one of the houses of Congress. This would at once place the control of the executive power of the nation in the hands of the leaders of the majority in both branches of the legislature, or at least in the leaders of that branch which more effectively represented the electorate. The president would cease to carry his present load of responsibility for executive action and legislative progress. His office would be important, for he would be that human agency necessary to place the representatives of the victors at the polls in control of the executive power. His influence as a member of the council of state would be considerable. With a veto power over legislation he would still retain an enormous one-man power.

## CHAPTER XIX

### CONCLUSION

The conflict between extra-legal government and the popular demand for a true democracy is as irresistible as was the conflict between the South and the North over the institution of slavery. Extra-legal government, like the South, represents a vast property interest which, while at first seeking protection, soon became aggressive in its desire to extend its power and its institutions. As the North sought to live with the institution of slavery in the South, to compromise with it and to check it here and there, so we have been trying to live with extra-legal government, to compromise with it and to check it when we saw it in an especially obnoxious form. But as the fight for and against slavery was never settled till slavery was abolished, so the war on politocracy will never cease till some great national crisis has given birth to a new political philosophy and a sound practice under it,

which will sweep extra-legal government from the field. That philosophy is summed up in three prosaic words: The Short Ballot. They are the emancipation proclamation for our government. The faithful and complete application of the principles underlying the short ballot in our local and state governments will be as important and perhaps as difficult a step for us to achieve as was the emancipation of the slaves.

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